107

Supreme Court, U.S.
FILED

08-456 SEP 16 2008

No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES SISSON and the

CHARLES SISSON REVOCABLE LIVING TRUST,

Petitioners,

v.

CYNTHIA G. WILCOX,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

Charles Sisson, Petitioner

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APPENDIX G--JUDGE COLLYER'S ASSESSMENT OF THE SIGNIFICANCE OF MR. FRANK'S TESTIMONY IN THE CONTEXT OF EMPHASIZING THAT SHE WAS NOT AWARDING PLAINTIFF EXCESSIVE LEGAL FEES:

"Mr. Sisson's complaint that both Mr. Zweifach and Mr. Mital attended the deposition of **Richard Frank, Ms. Wilcox's contractor who identified and corrected the flaws in the Dexter Property**, falls flat. **Mr. Frank was a critical witness**, prepared by Mr. Mital for his deposition testimony, but necessary for Mr. Zweifach to observe at deposition and in preparation for putting Mr. Frank on the stand at trial. Given the reliance Mr. Zweifach placed on Mr. Mital to handle the preparation of the case, with its resulting efficiencies (and success), the Court does not fault Williams & Connolly for having both lawyers attend **particularly crucial depositions**. (emphasis added)."

Memorandum Opinion on Fee Application, Civil Action No. 02-1455 (RMC), United States District Court for the District of Columbia, May 25, 2006, pp.15-16.

APPENDIX H—EXCERPTS FROM MR. RICHARD FRANKS' DEPOSITION CONDUCTED UNDER THE UNITED STATES BANKRUPTCY COURT, APRIL 18, 2007 IN WHICH HE DENIES SEEING ANY AFFIDAVIT PREPARED TO MEMORIALIZE HIS CONFESSION OF CHAMPERTY, STATES THAT MS. WILCOX TRIED TO PURCHASE HIS TESTIMONY, AND **FOR THE FIRST TIME IS ALLOWED TO TESTIFY THAT HE WAS COMPENSATED FOR SUPPORTING THE PLAINTIFF'S LAWSUIT AND WAS NOT AN 'UNCOMPENSATED FACT WITNESS' AS DESIGNATED BY THE COURT.**

PAGE 9

[BY MR. HENRY, MR. SISSON'S COUNSEL]

Q. ...Documents relating or referring to your or Archway's agreement with Mrs. Wilcox to receive 25 percent of any judgment in her favor against Mr. Sisson. Is it your testimony there are no such documents?...

A. There are no such documents.

Q. Okay. So, for example, the affidavit that Mr. McMahon drafted for you would not be such a document?

[BY MR. LEWIS, ATTORNEY FOR MR. FRANK]

Statement: Object to the form.

A. I've never seen such an affidavit.

PAGE 14

[BY MR. HENRY]

Q. And this oral agreement to have a portion of what she [Ms. Wilcox] recovered against Mr. Sisson, was that a subject of the arbitration?

A. There was no oral agreement.

Q. So there was a discussion between you and Mrs. Wilcox but no agreement; is that your testimony?

A. There was no discussion. She mentioned it. I did not agree to it. She brought it up to me.

PAGE 18

Q. And your reason for not entering into it is because Mr. Zweifach [attorney for Ms. Wilcox] told you not to?

A. No. I was not going to do it. I was not going to do it. It was brought up at a meeting between Mrs. Wilcox and Mr. Zweifach, and I was not going to have any parts [sic] of it.

PAGE 27

Q. So the backup for your draw request did not have a line item for your time relating to the litigation support?

R. That is correct.

S. But the draw request did ask for money for that?

T. Didn't specifically ask for money for that, but there was included in the pay request money for time I spent on any hourly or litigation stuff that I did.

U. But it was not broken out as such?

V. It was not broken out.

PAGE 39

Q. Now, this is an affidavit of Mr. McMahon that says he faxed the affidavit which was....Exhibit 4 [the affidavit Mr. McMahon prepared for Mr. Frank to sign memorializing his confession] you testified you had not seen before.

A, Correct.

Q. Mr. McMahon's affidavit [presented here as Appendix C] indicates that he faxed Exhibit 4 to you on February the 6th.[2006]. Do you recall receiving a copy of that at your office?

A. I do not.

Q. Look at paragraph 5 of [Appendix C in this writ], please, sir. Mr. McMahon's affidavit states that after faxing the affidavit to your office he had a conversation with you in which you told him that you did not have a problem with the content of the affidavit. Do you recall that?

A. I do not.

Q. You don't recall whether it happened or not, or you believe it did not happen?

A. I don't recall ever speaking to Mr. McMahon. I don't recall seeing the affidavit.

Q. Mr. Frank, do you recall speaking to Mr. Lewis about the affidavit that was prepared for you by Mr. McMahon?

A. I do not.

Q. Do you recall speaking to anyone about it?

A. I do not.

APPENDIX I—STATEMENT BY PLAINTIFF'S ATTORNEY MR ZWEIFACH IN A LETTER DATED JULY 27, 2006 TO WALLACE E. SHIPP, JR, BAR COUNSEL, RESPONDING TO ISSUES OF HIS ETHICAL CONDUCT IN THE WILCOX TRIAL, IN WHICH HE CONFIRMS THAT HE AND MR. FRANK DISCUSSED THE AFFIDAVIT MR. FRANK DENIED EVER SEEING OR EVER DISCUSSING WITH ANYONE IN HIS DEPOSITION

"...Mr. Frank subsequently told me that Mr. Sisson or his lawyer repeatedly asked him to sign affidavits that contained false statements and he refused to do so...."

APPENDIX J—COMMENTARY BY MR SISSON WHICH IDENTIFIED PHONE CALLS BETWEEN HIMSELF AND MR. FRANK IN **PHONE COMPANY RECORDS** THAT ACCOMPANIED SISSON AFFIDAVIT ATTESTING TO THE FACT THAT MR. FRANK'S VOLUNTARY APPEARANCE AT MR. MCMAHON'S OFFICE HAD AN AGENDA AND WAS NOT A SOCIAL VISIT

1. 1/17/06, 10:40 a.m. Call to James Vann, who had been Mr. Frank's attorney at the time of the [Wilcox] trial, but at that time was working at the ATF. Spoke with him to see if Mr. Frank would cooperate and he suggested my calling him [Mr. Frank] and provided his office number.

2. 1/17/06, 10:44 a.m. Call to Mr. Frank's office. Left a message that he call me at my office.

3. 1/17/06 11:09 a.m. Mr. Frank returned my call and agreed to cooperate, stating that the decision to replace rather than repair systems had been driven by Ms. Wilcox's renovation program rather than any alleged Sisson "defects".

4. 1/18/06 3:59 p.m. I called Mr. Frank from my cell phone, and he said he would meet with Martin [McMahon] to discuss misleading aspects of his testimony at the trial.

5. 1/20/06 1:04 p.m. I spoke with Mr. Frank to confirm he was in contact with Martin [McMahon].

[2/1/06 Mr. Frank voluntarily met with Mr. McMahon in his office.]

6. 2/8/06 9:23 a.m. I spoke with Mr. Frank again, urging him to sign the deposition Martin had prepared for him

memorializing the content of their discussion. Mr. Frank said he wanted to, as it was correct word-for-word, but he was afraid to for fear of retribution from Ms. Wilcox

APPENDIX K—UNITED STATES DISTRICT COURT OPINION ON WILCOX V. SISSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA G. WILCOX,

Plaintiff,

v. Civil Action No. 02-1455 (RMC)

CHARLES SISSON and

CHARLES SISSON REVOCABLE
LIVING TRUST,

Defendants.

MEMORANDUM OPINION

This is a case concerning a house built by workers who did not know their trades, a seller who wanted to avoid legal obligations and maximize profits, and a buyer with limited time to purchase a home. The collision course is obvious from these limited facts. The buyer now sues for the benefit of her bargain. The seller's defenses being without merit, the Court will award damages to the buyer in the amount of $847,224.46, plus reasonable attorneys' fees in an amount to be determined. The case was tried to the Court between

August 18, 2004 and August 26, 2004. Both parties have submitted post-trial proposed findings of fact and conclusions of law.

FINDINGS OF FACT

This is an action for fraud and breach of warranty in the sale of residential real estate. Cynthia Wilcox charged that defendant Charles Sisson deceived her into purchasing a home for her family based on written and oral assurances that the home was newly-constructed, well-built, and free from defects. Ms. Wilcox further charged that Mr. Sisson misled her with copies of counterfeit building inspections and that he had obtained permits only by misrepresenting the construction project to the District of Columbia. Ms. Wilcox charged that the home contained multiple serious structural defects and dangerous violations of the housing code and that various systems of the house, including the plumbing and HVAC (heating, ventilation and air conditioning) systems, were dysfunctional. Finally, Ms. Wilcox alleged that the Sisson Trust, the purported seller of the house, was a sham and that Mr. Sisson is personally responsible for her damages. First Am. Compl. para

Based on the entire record, the trial evidence, the demeanor of the witnesses, and the credibility determinations below, the Court makes the following findings of fact:

A. The Parties

1. The plaintiff, Cynthia G. Wilcox, lives in the District of Columbia at 4815 Dexter St. N.W. (the "Dexter Property"), a home sold to her by the defendants Charles Sisson and the Charles Sisson Living Revocable Trust ("Trust") (collectively, the "Sisson Defendants"). Plaintiff's Exhibit ("PX") 108. Ms. Wilcox had been living in Europe with her family and moved to Washington when her older

son was in his first year at American University. Trial Transcript ("Tr.") 41-42 (Wilcox) 8/18/04 a.m. She wanted a home large enough to accommodate an extended family, including her elderly godparents. *Id.*

2. Mr. Sisson lives at 9730 Maury Road, Fairfax, Virginia. Sisson Dep. 4/30/03 p. 6. He works as a senior economist at the International Monetary Fund. Sisson Dep. 11/27/01 pp. 13-15. He has also regularly purchased single-family houses or condominiums, renovated them, and sold them. *Id.* pp. 24-30.1 He purchased the Dexter Property in 1998 intending to do the same thing. *Id.* 1 [1] 2. The Dexter Property was acquired in the names of both Mr. Sisson and his wife. PX 92.

3. The Trust was purportedly organized under the laws of Virginia. PX 93.

4. Dana Preister and his company, Mid-County Construction Corp., are citizens of Maryland. Preister Answ. para 4; Mid-County Answ. para 4. Mr. Sisson hired Mr. Preister to be the construction supervisor for the construction on the Dexter Property. Tr. 96 (Preister) 8/23/04 p.m. Mr. Sisson had used Mr. Preister to renovate houses on two previous occasions

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[1] The Dexter Property has spawned litigation between the construction supervisor, Dana Preister, and Mr. Sisson in Superior Court; the instant lawsuit; and, allegedly, a suit between Richard Frank, the remodeling contractor, and Ms. Wilcox. In a deposition dated November 17,2001, taken in connection with Mr. Preister's suit against Mr. Sisson,. Mr. Sisson estimated he had bought and renovated about 10 residences and had acted as his own general contractor on many of them. In a deposition dated July 28, 2003, in connection with the instant matter, he stated that he had never acted as a general contractor on his projects until August 2000, when Mr. Preister left the Dexter Property. Sisson Dep. 7/28/03 p. 16 ("Q. Have you ever acted as a general contractor on a renovation project? A. Up to that point, no."). The Court credits the first, more detailed, statement

before the Dexter Property project. Tr. 23 (Sisson) 8/23/04 a.m. The Sisson Defendants brought a third-party claim against Mr. Preister and Mid-County for contribution in the event of a recovery by Ms. Wilcox in this action. The Court granted Mr. Preister's motion for summary judgment in January of 2004. 1/13/04 Order. The Sisson Defendants and Mid-County reached a settlement before trial, by which Mid-County paid a modest sum to Mr. Sisson and Mr. Preister agreed to cooperate with the defense of this action. Tr. 93-95 (Preister) 8/23/04 p.m.; PX 225.

5. The Court has jurisdiction because there is complete diversity between the parties and the amount in controversy is over $75,000.

B. Dexter Property Remodeling

Permits and Approvals

1. Through engineer Keith Preddie, Mr. Sisson applied for a building permit in August 1999 to renovate the existing one-story, 1,500 square-foot house that was on the Dexter Property when he purchased it. PX 30 ("REMODEL EXISTING HOUSE AND ADD ADDITION (2 STORY)" at an estimated cost of $90,000) (capitals in original). The ensuing permit allowed Mr. Sisson to expand the existing structure to a 3,240 square-foot, two-story house. PX 31.

2. Mr. Sisson then proceeded to build a 7,000 square-foot, three-story house at the Dexter Property. PX 2; PX 53.

3. The building plans submitted by Mr. Sisson in August 1999 were the only plans ever submitted by him to the District of Columbia to support any building permit.[2] Tr. 74-

[2] 2 By agreement of the parties, deposition testimony was submitted in evidence from Marquette Sanders, of the D.C. Department of Consumer

76 (Sanders) 8/20/04 a.m.; Tr. 60-61 (Frank) 8/19/04 a.m.; Tr. 101-02 (Preister) 8/23/04 p.m.; PX 55. Those plans did not depict a third floor on the house, although Mr. Sisson built a third floor. Tr. 7779 (Marshall) 8/20/04 a.m.; PX 55.

4. Inspectors from the Building Inspection Division of the Building and Land Regulations Administration, Department of Consumer and Regulatory Affairs for the Government of the District of Columbia ("BID"), are supposed to inspect regularly and approve residential and commercial construction in the District. Tr. 76-79 (Marshall) 8/20/04 a.m. BID structural engineers review construction for its structural integrity when they review the permit drawings and issue permits. Marshall Dep. pp. 7-8. Mr. Sisson's failure to submit accurate plans depicting the correct number of floors and square footage deprived BID officials of a meaningful opportunity to assess the structural integrity of the construction project. Tr. 77-80 (Marshall) 8/20/04 a.m.; Marshall Dep.7/22/03 p. 11 (Q. [I]if the plans for a house that you approved only depicted two floors but a third floor was going to be built on top, would that be important to show . . .? A. Yes, yes. Q. And why is that? A. The load that a two-story building would place on the soil is less than a three-story."); Marshall Dep. 7/22/03 p. 20 ("The size of the building . . . would play a part in how many – the size of the beams, the size of the joists, et cetera, and the actual layout of the building based on the size . . . ."); Tr. 61 (Frank) 8/19/04 a.m.; Tr. 97-98 (Edelson) 8/19/04 p.m.

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and Regulatory Affairs; Carl Marshall, Structural Engineer, Department of Consumer and Regulatory Affairs, Building and Land Regulations Administration, Permits Review; and Robert Shelton, Inspector, Department of Consumer and Regulatory Affairs, Building and Land Regulations Administration, Building and Inspection Division. When specific parts of these depositions were referenced in court, the trial transcript reference is provided. The Court also cites directly to these depositions.

5. A builder would be required to apply for a new permit if he added a third story to a house that was not on the original drawings, if he moved a kitchen from its location on the original drawings, and/or if he put two bedrooms where one was shown on the original drawings. Marshall Dep. 7/22/03 p. 45. An additional permit fee would be assessed for an amendment to the initial design. *Id.* The house as built by Mr. Sisson on the Dexter Property had a third story that was not on the original drawings he submitted for a permit, moved the kitchen from its location on the original drawings, and put two bedrooms where one was shown on the original drawings. Compare PX 65 to PX 64. Mr. Sisson never obtained an amendment to the initial permit.

6. Inspectors come to review residential construction when the contractor notifies them that some aspect of construction (electrical, plumbing, structure, etc.) is ready for inspection. Tr. 62-63 (Lofgren) 8/23/04 p.m. ("[T]hey don't watch the work. The milestones that you reach, you call them, they come out."). Among others, inspections are made of footings, framing structures, backfill, and close-in inspections. Shelton Dep. 7/25/03 p.11. A close-in inspection is an inspection of the framing and is not the same thing as a "final" inspection. *Id.* Marshall Dep. 7/22/03 p. 29 ("This [close-in] approval is when the framing is up, right, and they want to put sheetrock on the walls . . . ."). Partial inspections can also occur. Shelton Dep. 7/25/03 p. 48. The inspectors are not structural engineers. Marshall Dep. 7/22/03 p. 7.

7. Four apparent inspection approvals were received in evidence: a BID Construction Branch close-in approval dated December 20, 1999; a BID Electrical Branch final approval dated August 16, 2000; a BID Plumbing Branch final approval dated May 7, 2001; and a BID Construction Branch final approval dated June 8, 2001. PX 68. The dates on these approvals are suspect: demolition of the prior house started in October 1999 and construction was completed in

September 2000. Given that timeframe, and with the assistance of a homemade video,[3] the Court concludes that the December 1999 approval could only have been a partial close-in approval. The house was not constructed enough in December 1999 to have all walls ready to close in, i.e., put drywall or sheetrock over the framing. See PX 103. But the walls would have been in place by August 16, 2000, depriving any inspector of an opportunity to observe the electrical wiring. The same is also true for the plumbing approval dated in May 2001, long after construction had concluded. No inspector could have actually inspected the plumbing in May 2001, unless he had torn down walls and torn up floors, which did not happen. BID Inspector Robert Shelton testified that he never did a final approval on the Dexter Property and, when shown the June 8, 2001, final approval, asserted "[t]hat's not my signature." Shelton Dep. 7/25/03 p. 19. The Court credits this statement, despite Mr. Shelton's later statement that "I'm not saying that it definitely isn't mine, but from – you can see my other signatures. It's not like that one." *id.*, p. 20, because to do otherwise would be to assume that BID inspectors give approvals even when they do not, and cannot, inspect, an accusation neither side makes.

8. The Court specifically rejects Mr. Sisson's proposed finding that "[a] District of Columbia inspector periodically placed approval stickers on the house." Defs.' Proposed Findings p. 2 ¶ 3. Even if the inspection approvals entered into the record were all to be credited, which theyare not, the evidence is limited to a framing inspection in December 1999, an electrical inspection in August 2000, and a

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[3] Mr. Preister made a video of the demolition and construction process on the Dexter Property, until he left the project in August 2000. DX 8. He did this because he was proud of his work. Tr. 112 (Preister) 8/23/04 p.m. Mr. Preister had previously done smaller remodeling jobs.
The Dexter Property was the first house he ever built. As the evidence makes clear, he did not have the know-how or skills to take on this task

plumbing inspection in May 2001. Inasmuch as construction was basically completed when Mr. Preister left the project in August 2000, there is no credible evidence of periodic inspections during actual construction. Therefore, the Court also specifically ejects Mr. Sisson's proposed finding that he "could – and did – rely on those stickers to show that the approved work was properly done." *Id.*

9. Based on the testimony of the BID officials and the entire record, the Court finds that Mr. Sisson exceeded the permit he obtained from the BID.

10. Based on the testimony of the BID officials and the entire record, the Court finds that the electrical, plumbing and "final" BID approvals were not based on actual inspections and were either obtained fraudulently or were forged.

11. Based on the testimony of Mr. Preister, which the Court credits in this regard,[4] and on the entire record, the Court finds that Mr. Sisson was fully aware of the fact that the Dexter Property was constructed without appropriate permits. Mr.Preister confirmed that Mr. Sisson served as his own general contractor on the Dexter Property construction and made the decisions regarding the house's design. Tr. 96-97 (Preister) 8/23/04 p.m. Mr. Sisson's deposition testimony made the same point:

> It was a year in actual construction. Originally, I didn't plan to do nearly as much. I had planned to just kind of put a second wing on the house. And I

[4] The Court credits much of Mr. Preister's testimony. His demeanor through direct examination and cross was open and candid, with some regret and confusion as to the construction errors at the Dexter Property. The Court concludes that Mr. Preister was grossly in over his head and tackling a project for which he lacked critical skills.

> thought I would do minimal improvements – well, not minimal but not major improvements.
>
> But the more I started thinking about it, and frankly the large price I put into it, I thought there was only one way to justify doing something. And that was to do a major renovation.
>
> It kind of mushroomed. It wasn't anything intentional or planned. It just kept getting bigger and bigger as I kept thinking about what would be done.

Sisson Dep. 7/28/03 pp. 8-9. Mr. Sisson's direct role is confirmed by the fact that the size of the house mushroomed from 3,500 square feet to 7,000 square feet without further engineering or architectural drawings for BID review. Mr. Sisson visited the construction site nearly every day and otherwise kept in close and regular communication with Mr. Preister. Tr. 97-98 (Preister) 8/23/04 p.m.; Tr. 58-59 (Sisson) 8/20/04 p.m.; PX 103.5 Mr. Sisson controlled the hiring and firing of subcontractors, at one point refusing to allow Mr. Preister to fire the plumber even though the plumber was "cutting corners" and doing shoddy work. Preister Dep. 9/25/03 p. 16; Tr. 98-99 (Preister) 8/23/04 p.m.[5] Mr. Sisson identified and/or hired the roofer, the plumber, and the drywaller for the project. Sisson Dep. 7/28/03 pp. 19-21. Mr. Sisson told Mr. Preister to add a third floor to the house, Tr. 101 (Preister) 8/23/04 p.m., despite never obtaining a permit to do so. He then testified that he was uncertain as to whether the Dexter Property had a third floor or not. Tr. 156 (Sisson)

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[5] 5 Mr. Sisson testified that he traveled for a month at a time on multiple occasions while the Dexter Property was under construction. Tr. 77 (Sisson) 8/24/04 a.m. He never gave dates, reasons, or destinations for this alleged travel. The Court finds that there is insufficient evidence to support this testimony and, because it discredits Mr. Sisson generally, finds that this testimony was, at best, considerably exaggerated.

8/20/04 p.m. This kind of evasive testimony is one reason the Court does not find Mr. Sisson to be a credible or trustworthy witness.

12. The evidence is clear: the construction of the Dexter Property was not properlypermitted by BID officials or approved by D.C. inspectors, and Mr. Sisson knew it. Nonetheless, Mr. Sisson assured Ms. Wilcox that the house was fully approved. PX 6. This assurance was vital to Ms. Wilcox in deciding to proceed to closing on the purchase of the house. Tr. 82 (Wilcox) 8/18/04 p.m.[6]

C. Mr. Sisson's Dissatisfaction with Mid-County's Work

1. Messrs. Sisson and Preister were involved in more than one renovation project together at the time that construction on the Dexter Property was on-going. Mr. Sisson decided that he needed to sell the Dexter Property to ease his cash flow. Sisson Dep. 7/28/03 p. 9. But his realtor told him that the house had several problems and that the "quality of construction" would be found "unacceptable" by prospective buyers. PX 141.

2. In a deposition he gave as a defendant in the lawsuit brought by Mr. Preister in Superior Court,[7] Mr. Sisson

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[6] The Court found Ms Wilcox to be an entirely credible witness. She testified in an open and candid manner and did not exaggerate or become melodramatic in recounting her experience with the Dexter Property. Ms. Wilcox testified on two occasions in a consistent manner, even though she was suffering from an ongoing personal medical emergency that caused her to be absent and in hospital during parts of the trial. Tr. 2-3 (exchange between Mr. Zweifach and the Court) 8/24/04 a.m.

[7] *Dana Preister v. Charles Sisson*, Civil Action No. 01-002543, Superior Court for the District of Columbia.

identified an astonishing array of visible flaws in the final house at the Dexter Property. Mr. Sisson's own realtor had identified these defects in February 2001, as things that needed correction if the house were to be sold, and Mr. Sisson, as deponent, explained what he did to address these flaws:

- "We didn't do anything about the unevenness in the marble insets." Sisson Dep.11/27/01 p. 126.
- "You'll notice here it says, 'wood floors cracks between planks,' so it was noted as a deficiency. We didn't do anything about that." *Id.* pp. 126-127.
- "We didn't replace the closet pine doors that should have been maple." *Id.* p. 127.
- "We didn't do anything about the hump in the floor outside the one child's bedroom." *Id.*
- "We didn't do anything" to repair a "'space between top of panel and ceiling.'" *Id.* pp. 127-28.
- "We did do an adjustment" to address the complaint that "'[d]oors to cabinets do not meet.'" *Id.* p. 128.
- "[W]e had to replace" the air conditioning and heating vents, which "were not properly located and . . . needed to be changed." *Id.* p. 131.
- "We had to redo the shoe molding" because the realtor disapproved and some was not attached at all. *Id.* p. 135.
- Mr. Sisson did nothing to correct the thresholds, which "were very small and not very sightly." *Id.* p. 136.
- Mr. Sisson fixed the front door and other doors, which "had problems of closing. They just didn't close correctly. They weren't flush." *Id.*
- "The kickplates for the dishwashers had not been installed" and were put in place. *Id.* p. 137.
- The kitchen had no refrigerator. *Id.* p. 138-39.
- "[T]here [weren't] sufficient vents in the basement, . . . some of the rooms were not properly ventilated or accessed, and we had a fellow come in and put a couple holes, and put in additional vents." *Id.* p. 145.

• "We didn't do anything about" the fact that the "'[w]ater heater [was] too small for whole house use.'" *Id.* p. 148.
• Mr. Sisson "did address" the wires to the security system, which "were just left dangling." *Id.* p. 149.
• "[W]etness and smell" were "a large concern and frequently expressed. . . . That was a continuing issue and we had a major problem. We repainted the basement to try and get the smell out, replaced the carpet . . . and put in a couple dehumidifiers." *Id.* pp. 149-151.

Thus, well before Ms. Wilcox expressed any interest in purchasing the Dexter Property, Mr. Sisson was unhappy with the quality of the workmanship in it. Tr. 55, 70, 72 (Sisson) 8/20/04 p.m. Yet Mr. Sisson represented to Ms. Wilcox that he had constructed the Dexter Property to an especially high standard because he had intended to live there with his family. Tr. 46 (Wilcox) 8/18/04 a.m.; Tr. 5 (Sisson) 8/20/04 p.m. With greater candor, Mr. Sisson admitted to Mr. Preister that he had purchased the Dexter Property for an investment only and never intended to use it as a home for his family. Tr. 106-07 (Preister) 8/23/04 p.m.

3. Mr. Sisson had also observed that some of the work on the Dexter Property was not done according to the construction code. Tr. 74-75 (Sisson) 8/20/04 p.m. Then again, he did not think these were important problems because he regards the construction code as "crazy" and testified that "nobody anywhere follows the code" in building a house. *Id.* pp. 77, 82.

4. Mr. Sisson's realtor recognized that the Dexter Property was built "without the kind of architectural experience, specs, and plans that accompany most such undertakings," and that buyers were likely to balk. PX 141. At least one prospective buyer had looked closely at the house and decided not to make an offer at any price. *Id.*

5. Mr. Sisson did not warn Ms. Wilcox of the negligent construction or the code violations that he knew had occurred at the Dexter Property. Tr. 70-71, 76-79, 85-87 (Sisson) 8/20/04 p.m.

6. Based on the overwhelming weight of the evidence, as well as the Court's opportunity to observe the demeanors of Ms. Wilcox, Mr. Sisson and Mr. Preister, the Court finds that Mr. Sisson knowingly misled Ms. Wilcox about whether he had built the house especially well for his own family, about whether he believed honestly that the house was well constructed, and also about whether the construction was properly permitted and approved by BID.

D. The Sale of the Dexter Property

1. Ms. Wilcox first visited the Dexter Property in early May 2001 with her real estate broker and Mr. Sisson's realtors. Tr. 41-43 (Wilcox) 8/18/04 a.m. She made an offer of $1,950,000 to purchase the house on May 4. Tr. 47 (Wilcox) 8/18/04 a.m.; PX 3. On May 5, the parties agreed on a purchase price of $2,050,000, contingent on a home inspection. Tr. 47 (Wilcox) 8/18/04 a.m. The home inspection clause gave Ms. Wilcox a ten-day period to inspect the property, with a right to revoke the contract, recover her deposit, and declare the contract void at any time during those ten days. Tr. 47-48 (Wilcox) 8/18/04 a.m.; PX 3 at CW 0009; see also *Wilcox v. Sisson*, No. 02-1455 (RMC) 1/13/04 Memorandum Opinion, p. 11.

2. Through her real estate broker, Ms. Wilcox contracted with Charles Itte to inspect the Dexter Property. Tr. 48-49 (Wilcox) 8/18/04 a.m. After his inspection, Mr. Itte prepared a letter listing 19 problems that he had identified. PX 4 (the "Itte Report"). Based on this report, Ms.Wilcox was afraid that "there could be problems in the property" and that she

needed a warranty from Mr. Sisson. Tr. 14 (Wilcox) 8/18/04 p.m. Specifically, Ms. Wilcox testified that:

> The air conditioning systems could not be checked.[8] That was a little bit of a concern since that's a very big ticket item. . . . The whirlpool bathtub was a bit of an issue. That could have caused electrocution of someone getting in that tub. The fake ventilations in the bathrooms were a bit of a concern because it showed sort of a deception that was possible there. *Id.*

3. On her behalf, Ms. Wilcox's attorney wrote to Mr. Sisson on May 10, 2001, demanding additional warranties for the Dexter Property. Tr. 52 (Wilcox) 8/18/04 a.m.; PX 5. The letter demanded copies of all architectural plans and permits, as well as written confirmation that the Residence, which was represented, both by the selling agent and in selling literature at the Residence, to be 'newly constructed' is in fact newly constructed and that the residence [sic] is warranted by Seller (which warranty shall survive settlement under the Contract) as follows: (1) for five years from settlement, that the Residence is free from structural defects, (2) for two years from settlement (but, in the case of appliances, not greater than the scope and length of the manufacturer's warranty), that the Residence is free from any defect in electrical, plumbing, heating, cooling, and ventilating systems, and (3)

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[8] Mr. Sisson argues that "[t]his statement is contradicted by Mr. Preister, who testified that the air conditioning worked . . . ." See Tr. 41 (Preister) 8/24/04 a.m. Defs.' Proposed Findings, p.3 n.2. This argument has no weight: first, because Mr. Preister had not been at the Dexter Property since August 2000 and the Itte inspection occurred in May 2001; and second, because further investigation revealed that, indeed, the air conditioning system was installed in a seriously flawed condition.

for one year from settlement, that the residence [sic] is free from any defects in materials and workmanship. PX 5; Tr. 52 (Wilcox), 8/18/04 a.m. Ms. Wilcox would have voided the sales contract if Mr. Sisson had not provided the additional warranties. Tr. 52-53, 54-55 (Wilcox) 8/18/04 a.m.

4. Mr. Sisson's realtor knew that the house had flaws and that Mr. Sisson was not going to spend the monies necessary to correct them; nonetheless, Mr. Sisson "somehow" and "some way" needed to sell the house. PX 141. Therefore, the realtor took the letter from Mr. Lundy, rewrote portions of it, and presented it to Mr. Sisson to provide the additional warranties demanded by Ms. Wilcox. Tr. 4-5 (Sisson) 8/23/04 a.m. To induce Ms. Wilcox to proceed to closing and not to exercise her right to walk away from the Dexter Property, Mr. Sisson agreed to provide the warranties she had demanded. PX 6. He also promised to provide the building permits and approvals related to the construction. Tr. 53 (Wilcox) 8/18/04 a.m. Mr. Sisson provided a signed copy of a contractual addendum to Ms. Wilcox on May 15, 2001. PX 6. It provided:

> - Seller accepts responsibilities for warranties to the home that will survive settlement as follows:
> A. for five years from settlement, that the Residence is free from structural defects;
> B. for two years from settlement (but, in the case of appliances, not greater than the scope and length of the manufacturer's warranty) that the Residence is free from any defect in electrical, plumbing, heating, cooling, and ventilating systems;
> C. for one year from settlement, that the Residence is free from any defects in materials and workmanship. PX 6.

These warranties were in addition to the warranties already contained in the contract of sale.

5. Mr. Sisson signed the addendum with additional warranties as "Seller" and not as "Trustee." PX 6.

6. Mr. Sisson's realtor discussed with him the option of purchasing warranty insurance, and provided him with a sample policy for his consideration, but he declined. PX 146. He testified that a family had lived in the house for six months prior to the sale, for free, without complaint. Tr. 26-27 (Sisson) 8/23/04 a.m. He also testified that he read the Itte Report and had confidence that it listed all the problems with the house. Tr. 28 (Sisson) 8/23/04 a.m. This latter testimony is incredible because Mr. Sisson knew of flaws identified by his realtor – such as basement dampness and smell, ventilation problems, an insufficient water heater, and uneven floors – which were not covered by the Itte Report. The Court concludes that Mr. Sisson wanted to sell the house "some way" and "somehow" without regard to the truthfulness of his statements and assurances to Ms. Wilcox.

7. Neither the original warranty in the contract of sale nor the additional warranty in the addendum contained any provision that Mr. Sisson would be notified of defects or given a right to cure any defects before liability could attach. PX 3; PX 6. One of Mr. Sisson's experts agreed that the industry practice is to specify limiting conditions, such as notice or cure rights, in the warranty itself. Tr. 38-40 (Fernebok) 8/25/04 p.m. Ms. Wilcox did not intend the warranty to give Mr. Sisson notice or cure rights on serious or systemic problems. Tr. 18 (Wilcox) 8/18/04 p.m.; Tr. 80 (Wilcox) 8/25/04 a.m. She explained her understanding as follows:

> If a toilet broke, I would assume that Mr. Sisson would be there to fix it. If a[n] appliance didn't work correctly, I would expect Mr. Sisson or one of his vendors to fix it. An entire system that was defective, intentionally deceiving me, is not what I would ever have expected to have been dealing

> with, or the other issues that came up that were clearly showing me I was dealing with a dishonest representation.

Tr. 18 (Wilcox) 8/18/04 p.m.

8. Mr. Sisson testified that at closing, he told Ms. Wilcox, "[I]f there is something wrong, just call me and I'll come over and fix it" and she replied, "Sure." Tr. 30 (Sisson) 8/23/04 a.m. This testimony was contradicted not only by Ms.Wilcox, Tr. 19-20 (Wilcox) 8/18/04 p.m., Tr. 80 (Wilcox), 8/25/04 a.m., but also by Mr. Sisson himself in prior deposition testimony. Tr. 37 (Sisson) 8/23/04 a.m.; Sisson Dep. 5/21/03 p. 386. Even if Mr. Sisson's trial testimony were to be credited, despite his general lack of credibility, the Court finds that this simple exchange, if it occurred, did not create notice and cure rights for Mr. Sisson to insist that his subcontractors return to the Dexter Property to correct their errors. This conclusion is buttressed by the fact that the warranty in the addendum, signed prior to the closing, is silent on the subject and Mr. Sisson had no discussion with his real estate agent, who presented the addendum to him for signature, about notice or cure rights. PX 146.

9. Based on this evidence, including but not limited to the express terms of the document signed by Mr. Sisson, the Court specifically finds that the parties did not agree that the warranties would provide for notice or a right to cure.[9]

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[9] The parties dispute whether Ms. Wilcox's lawyer or Mr. Sisson's realtor should be deemed the drafter of the warranty contained in the addendum, for purposes of construing it in favor of one side or the other. The record indicates that both had a hand in the actual language of the warranty as it was signed. Mr. Sisson testified that he never saw the letter from Ms. Sisson's lawyer and signed the warranty addendum as it was presented to him by his own realtor. Tr. 21 (Sisson) 8/24/04 a.m. Obviously, his reliance went to his own agent and not to Ms. Wilcox's

10. The Court further finds that the addendum and all the warranties provided by Mr. Sisson survived the closing, provided Mr. Sisson with no right of notice or opportunity to cure, and are enforceable by Ms. Wilcox. See PX 6.

11. The parties closed on the Dexter Property on June 7, 2001. Tr. 55 (Wilcox) 8/18/04 a.m. However, Mr. Sisson had not yet produced a final inspection approval. Accordingly, the parties entered into an Escrow Agreement, contingent upon, among other things, Mr. Sisson's production of the BID final approval. PX 244. On June 8, 2001, Mr. Sisson sent to Ms. Wilcox's attorney the purported final approval, with the handwritten note:

> Here is a copy of the final framing inspection, which I hope will satisfy the escrow requirement related to the sale of 4815 Dexter. Please authorize the settlement agent to release $10,000 of said escrow to me, using the wiring instructions provided previously. PX 68

. Because the Court has found that the "final" BID approval was either obtained fraudulently or was forged, it further finds that Mr. Sisson failed to fulfill the contingency behind the Escrow Agreement and cannot recover the $10,000 withheld at closing.

12. Ms. Wilcox and her entire family moved into the Dexter Property immediately upon closing on June 7, 2001. Tr. 55, 60 (Wilcox) 8/18/04 a.m.

E. Ms. Wilcox's Renovation Plans

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attorney. Equally to the point, the additional warranty contained in the addendum was in clear English and was not signed by a novice who could plausibly argue that he did not understand what he was signing. The evidence at trial proved that the warranty in the addendum was a critical term to the parties' contract and that it specifically induced Ms. Wilcox to proceed to closing. Tr. 52-55 (Wilcox) 8/18/04 a.m.

1. At the time she purchased the Dexter Property, Ms. Wilcox had plans to change and upgrade portions of it. Tr. 55-56 (Wilcox) 8/18/04 a.m. She anticipated spending between $400,000 and $600,000 on improvements, mainly in the form of upgrades to the kitchen, bathrooms and finishes, as well as to move one staircase, install a kitchen in the basement for her godparents, and change some windows. *Id.*; PX 7. The only modification to the floor plan involved moving the back staircase; otherwise, there were to be no changes to the fundamental structure of the house. Tr.56 (Wilcox) 8/18/04 a.m.; Tr. 57 (Edelson) 8/20/04 a.m. The only demolition would have involved turning around the washer/dryer, which faced into a hallway in the basement, so as to create a laundry room. Tr. 59 (Wilcox) 8/18/04 a.m.

2. Ms. Wilcox invited a local contractor, Richard Frank, to walk through the Dexter Property prior to the closing and during her ten-day inspection period. Mr. Frank and a local architect whom he consulted, Donald Lococo, agreed that the improvements Ms. Wilcox planned could be accomplished within her budget. PX 7.

3. Ms. Wilcox planned to return to Europe for most of the summer and then live in the house through the remainder of the planned upgrades. Tr. 10, 59 (Wilcox) 8/18/04 a.m.; Tr. 2529 (Lococo) 8/24/04 p.m. She understood that the improvements would be completed in three to four months. Tr. 59-60 (Wilcox) 8/18/04 a.m.

F. Defects in the Construction and Condition of the Dexter Property

First Discovery of Defects

1. On the morning of the closing after Ms. Wilcox and her family moved in, the Dexter Property's plumbing system

failed and the residents of the house had to deal with sewage that backed up into the pipes and basement-level bathtub and toilet. Tr. 60 (Wilcox) 8/18/04 a.m. Ms. Wilcox called Roto-Rooter, who attempted to clear the pipes. PX 8; DX 11. This effort was unsuccessful and sewage continued to back up into the bathtub and overflow onto the floor of the basement, destroying the carpeting. Tr. 60-61 (Wilcox) 8/18/04 a.m. A second visit by Roto Rooter made no difference. *Id.*

2. At Ms. Wilcox's request, Mr. Frank hired a master plumber, Steve White of Chase Plumbing, to investigate the plumbing system. Tr. 62-63 (Wilcox) 8/18/04 a.m.; Tr. 6 (Frank) 8/19/04 a.m.; PX 17. Mr. White ran a video camera through the system and discovered a large piece of ceramic from a broken toilet lodged in the pipes leading to the street. Tr. 62 (Wilcox) 8/18/04 a.m.; Tr. 6 (Frank) 8/19/04 a.m.; Tr. 42-43 (Frank) 8/19/04 p.m.; PX 17.

3. The discovery that the workmen had allowed a large piece of a toilet to drop into the plumbing system was only the beginning of the ordeal. Over the next eight months, Mr. Frank's crews discovered a continual series of deficiencies in the Dexter Property.

4. The plumber also advised that the "soil stack" through which all but one of the toilets in the house drained, on its way out into the city sewage system, was much too small for the number of toilets on the drain. Tr. 7 (Frank) 8/19/04 a.m.; PX 7. In apparent violation of the building code, the house had 7 bathroom toilets flowing through a 3" soil stack rather than the required 4" pipe. Tr. 62-63 (Wilcox) 8/18/04 a.m.; PX 17. Mr. Preister testified that he uses a 3" stack in all the houses on which he works, regardless of the number of toilets. Tr. 26 (Preister) 8/24/04 a.m. This testimony merely reflects Mr. Preister's lack of skills: regardless of the building code, it is self evident to the Court that the greater

the number of toilets in a house, the bigger the refuse pipe for a soil stack needs to be.[10]

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5. Because the plumbing system ruined the basement and could not handle the number of occupants in the house, all members of Ms. Wilcox's family other than herself and her younger son were forced to leave. Tr. 63-64 (Wilcox) 8/18/04 a.m.

6. Ms. Wilcox reported that she discovered within her first few days at the Dexter Property that the security system did not work because the wires were not connected. Tr. 64 (Wilcox) 8/18/04 a.m. The system was "roughed in but not finished." Tr. 8 (Frank) 8/19/04 a.m.; Tr. 34 (Preister) 8/24/04 a.m. Ms. Wilcox hired Cain Security to connect the system, PX 16, but they discovered that the system could not be connected. Tr. 55 (Frank) 8/19/04 p.m. The wires leading from the security box had been cut by being stapled during Mr. Sisson's construction and the system was never rewired. Tr. 52 (Lofgren) 8/23/04 a.m.; Tr. 63 (Wilcox) 8/25/04 a.m. As a result, the security system was inoperable. Tr. 55 (Frank) 8/19/04 p.m. The repair to the system cost $996.00. PX 16.

7. Mr. Sisson visited the Dexter Property on the weekend after the closing on June 7; he wanted to retrieve the refrigerator that had been put into the kitchen prior to sale but that Ms. Wilcox and the real estate agents had paid to replace to resolve a dispute at closing. Tr. 74-75 (Wilcox) 8/18/04 a.m. Ms. Wilcox reported the plumbing problems she was

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[10] It is notable but not dispositive that Mr. Itte did not comment upon the skinny soil stack in the Itte Report. Whether Ms. Wilcox might have a complaint against Mr. Itte for not noting this deficiency is irrelevant to whether she has a complaint against Mr. Sisson for building a house in which the plumbing system was inadequate for the number of bathrooms

experiencing but Mr. Sisson evidenced no interest in attending to any repairs. Tr. 75 (Wilcox) 8/18/04 a.m.; Tr. 80 (Wilcox) 8/25/04 a.m

8. Ms. Wilcox left the Dexter Property at the end of June 2001, asking Mr. Frank to repair the plumbing problems and begin some of the renovations that had been planned. Tr. 65-66, 68 (Wilcox) 8/18/04 a.m. She also hired Tile Masters to lay tile in the basement to replace the carpet that had been destroyed by untreated sewage. Tr. 65-66 (Wilcox) 8/18/04 a.m.; PX 22. (These new tiles were later torn up because of other defects that needed correction.)

9. When Mr. Frank removed the washer and dryer in the basement, preparatory to turning them around and facing them into a laundry room instead of the hallway, he discovered that the walls were wet and the pipes were not properly connected. Tr. 67-68 (Wilcox) 8/18/04 a.m.; Tr. 8-9 (Frank) 8/19/04 a.m. The pipes in the floor beneath the washer leaked. Tr. 8-9 (Frank) 8/19/04 a.m. In addition, the electrician had not placed a dedicated circuit for the dryer, a violation of the building code and a safety hazard. Tr. 8 (Frank) 8/19/04 a.m.

10. Ms. Wilcox returned to the Dexter Property in August 2001, just in time for torrential rains and flooding in the District of Columbia. The house had massive problems with the weather. The skylights, HVAC system, ceiling, windows and doors leaked profusely. Tr. 68-69 (Wilcox) 8/18/04 a.m.; Tr. 9, 22 (Frank) 8/19/04 a.m. Each and every window and door of the house was improperly flashed and improperly caulked. Tr. 57 (Frank) 8/19/04 a.m. The skylights in the house leaked copiously. Tr. 22, 52 (Frank) 8/19/04 a.m. The flat roof over the foyer leaked. Tr. 52 (Frank) 8/19/04 a.m. The bay window roof leaked. *Id.* The deck roof leaked. *Id.* The terrace above the kitchen leaked into the roof, leaving mud puddles in the kitchen. Tr. 69 (Wilcox) 8/18/04 a.m.

11. The August rain ruined floors, walls and ceilings throughout the house. Tr. 69-70 (Wilcox) 8/18/04 a.m. Mr. Frank estimated that it would cost $33,000 to repair the damage. PX 11. Not all of the repair work was done, however, since renovations were planned for some areas of the house. Tr. 52 (Frank) 8/19/04 a.m. ("temporarily remedied some of [the roof] problems because future work was planned").[11]

12. New problems were identified in September, starting with uneven cooling from the HVAC system. Tr. 68, 70 (Wilcox) 8/18/04 a.m. A condensate line in the system was leaking water onto the roof of the dining room and, during rainstorms, pouring into the basement. Tr. 9 (Frank) 8/19/04 a.m. In addition, Architect Donald Lococo discovered that there were 12 holes in the floor between the garage and the bedrooms above the garage used by Ms. Wilcox's children, which was allowing carbon monoxide to seep into the bedrooms. Tr. 71 (Wilcox) 8/18/04 a.m.; Tr.26-27 (Wilcox) 8/18/04 p.m.; Tr. 6-8 (Lococo) 8/24/04 p.m.; Tr. 67 (Wilcox) 8/25/04 a.m.

13. Mr. Lococo advised Ms. Wilcox that the carbon monoxide was an extremely dangerous condition for her children. Tr. 73 (Wilcox) 8/18/04 a.m. However, patching the holes would cost only "a few hundred dollars." Tr. 44 (Frank) 8/19/04 p.m. Mr. Preister believed that there were no holes in the garage at the time he left the project a year earlier, Tr. 35 (Preister) 8/24/04 a.m., but the value of this testimony is negligible because that time was remote from

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[11] Mr. Preister stated that he had not noticed any leakage problems in the house or had repaired the ones of which he was aware. Tr. 34 (Preister) 8/24/04 a.m. He also claimed that windows in a brick house do not need flashing. Tr. 37 (Preister) 8/24/04 a.m. Ms. Wilcox's experience demonstrates the inaccuracy of this opinion.

the sale and Mr. Sisson acknowledges significant work on the house after Mr. Preister's departure in August 2000 and in conjunction with his realtor's complaints about its condition in 2001.

14. To summarize, by mid-September 2001, Ms. Wilcox had experienced problems with the HVAC and plumbing systems (including leaking pipes under the washer); systemic leaking at windows, doors, skylights and roof; an inadequate electrical connection for the dryer; and carbon dioxide seeping into her children's bedrooms above the garage. Some of these problems were inconvenient or uncomfortable while others were dangerous. Mr. Frank recommended that he investigate the integrity of the HVAC and plumbing systems further. Tr. 12-13 (Frank) 8/19/04 a.m. Ms. Wilcox agreed; she again moved her family out of the house and authorized Mr. Frank to identify and correct the deficiencies. Tr. 73-74 (Wilcox) 8/18/04 a.m.; Tr. 72-73 (Wilcox) 8/25/04 a.m. The renovation project was put on hold and the $300,000-$400,000 budget became an unknown amount, depending on the extent of the deficiencies Mr. Frank might discover. Tr. 77-78, 84 (Wilcox) 8/18/04 a.m.

15. Ms. Wilcox authorized Mr. Frank to identify targeted areas and selectively remove finishes (walls and floors) to investigate the plumbing and HVAC systems. Tr. 13 (Frank) 8/19/04 a.m. The Court agrees with the experts who testified that this investigation and sampling method was reasonable under the circumstances and in light of the facts known at that time. Tr. 3334 (Edelson) 8/20/04 a.m.; Tr. 55-57, 96 (Lofgren) 8/23/04 a.m.; Tr. 38-42 (Kalreiss) 8/25/04 a.m. While this process ultimately prolonged the investigation into the house's deficiencies and increased the cost, it would have been unreasonable at that time to tear out full walls or floors in a newly purchased house.

16. In early October, Mr. Frank notified Ms. Wilcox that his crew had discovered a serious structural defect at the Dexter Property. Tr. 78, 80-81 (Wilcox) 8/18/04 a.m.; Tr. 14-15 (Frank) 8/19/04 a.m. One of the main support posts for the second floor was resting only on the plywood subfloor of the first floor, with a gaping six-inch space between it and the support column in the basement, on which it was supposed to rest. Tr. 14-15 (Frank) 8/19/04 a.m. (Hereafter, the "Alpha Column"). Mr. Frank moved his own workmen out of the house until he could shore up the post from below because he thought the house was unsafe. Tr. 15-16 (Frank) 8/19/04 a.m. Further investigation revealed several other unsupported posts. Tr. 14 (Frank) 8/19/04 a.m.

17. BID Inspector Shelton, who has conducted over 40,000 inspections, testified that when he visited the Dexter Property in December 2001 and observed this same critical support post for the second floor, constructed to rest on the plywood subfloor of the first floor without further support in the basement (although shored up by Mr. Frank), he thought it was the most egregious structural defect he had ever seen. Tr. 83-84 (Shelton) 8/20/04 a.m.; PX 12.

Structural Defects

1. Through his expert witness, Mr. Sisson concedes that there were eighteen (18) significant structural defects in the Dexter Property, some of which could have caused collapse of the building. Tr. 71-73 (Fernebok) 8/20/04 a.m.; Tr. 45 (Fernebok) 8/25/04 p.m. The Court reviewed multiple photographs confirming these defects. PXs 48, 49, 50, 51, 52, 226, 229, 230, 233, 234, 235 and 236. Because they were hidden behind the walls and under the floors of the finished house, these defects were not located and identified all at once. Tr. 20 (Frank) 8/19/04 a.m.

2. The project engineer, Frank Chow, inspected the property in late 2001 and reported by letter to Mr. Lococo, the architect, concerning observed defects in the structural framing. PX 42 ("Chow Report"). As to the first floor, Mr. Chow identified "[s]everal unsound bearing conditions underneath the post," "such as resting on plywood sheathing only;" and that the bearing beam "to carry [the] entire master bedroom floor load" was "unsound." *Id.* As to the second floor, he identified another post resting only on plywood sheathing with "no support directly under the plywood" and that the staircase to the third floor had "no support . . . [and] just leans on an adjacent wall by the dead weight of stair." *Id.* He determined that the ceiling joist under the attic floor had "no beam below to carry the load" and that the joist that carried the second-floor load also carried the roof load and was already sagging under the weight. *Id.* Finally, he reported that the A-frame construction of the ceiling of the master bedroom was improperly constructed and "will be unable to carry the required roof load." *Id.* See Tr. 83 (Frank) 8/19/04 a.m.; Tr. 28-29, 47 (Frank) 8/19/04 p.m. Mr. Sisson accepts the Chow Report in its entirety. Defendants' [proposed] Findings of Fact and Conclusions of Law, October 8, 2004, pp. 48-49. Beyond what is contained in the Chow Report, Mr. Frank and his workmen kept investigating and discovering additional defects through to March 2002. Tr. 40, 53, 69 (Frank) 8/19/04 a.m.

3. The most complete account of the structural defects at the Dexter Property was developed by structural engineer Rick Edelson.[12] Mr. Edelson was a remarkably clear and

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[12]Mr. Edelson, called as an expert by Ms. Wilcox, is the former chair of the D.C. Building Code Advisory committee. Tr. 60 (Edelson) 8/19/04 p.m., structural engineer of record for the repair and restoration of the Pentagon after September 11, 2001, Tr. 59-60 (Edelson) 8/19/04 p.m. and acknowledged by the Sisson Defendants to be extremely well qualified, in that they tried to retain Mr. Edelson's services, not knowing he had already been retained by Ms. Wilcox. Plaintiff's Proposed

comprehensive witness and the Court credits his testimony in its entirety. He explained the structural defects in the Dexter Property using his expert report, PX 57, his calculations, PX 58, his investigation notes and sketches, PXs 61, 62 and various building plans of the house. PXs 53, 64, 65, 66 & 67. As described below, the most frequent recurring error was the use of plywood subflooring (a single layer of plywood) to support weight-bearing columns on the first and second floors, with no support below to bring the weight down to the foundation. Mr. Edelson testified, without contradiction from Mr. Sisson's experts, that the following structural defects existed in the Dexter Property:

a) As Mr. Chow had noted, the master bedroom had a two-story ceiling in an A-frame configuration with a collar tie and no ceiling joists. PX 42. Mr. Edelson described this feature and concluded that it was inadequate to support snow loading in accordance with the D.C. Building Code. Tr. 79-91 (Edelson) 8/19/04 p.m.; PX 57. The cross beam holding both sides of the A frame together was too close to the peak of the "A," so that weight on the roof could have pushed the exterior walls outward, causing collapse under a snow load. Tr. 79-82 (Edelson) 8/19/04 p.m.; PX 57. Although not every winter in the District of Columbia experiences snow, the amount of snow in the last two winters (2002-2003, 2003-2004) would have been sufficient to cause collapse if the construction of the A frame had not been corrected. Tr. 81 (Edelson) 8/19/04 p.m.

b) The two exterior walls of the master bedroom were higher than the height of a normal ceiling because of the proportions of the A frame. These walls, of course, were actually

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Findings of Fact and Conclusions of Law, October 8, 2004, p. 22; Tr. 57-58 (Edelson) 8/19/04 p.m.

wooden studs onto which the interior and exterior finishes could be hung. The studs were not as tall as the walls were high so that there was a splice in the mid-span of the studs. Tr. 83 (Edelson) 8/19/04 p.m.; PX 57. With the splice, there was no continuity in the studs. Tr. 83-86 (Edelson) 8/19/04; PX 57. Mr. Edelson explained that the walls could have collapsed under wind load at the splice point. Tr. 83, 86 (Edelson) 8/19/04; PX 57.

c) The framing for a storage closet above the master bedroom dressing area was supported by a bearing wall that was inadequately supported by the subflooring on the second floor. Tr. 87-89 (Edelson) 8/19/04; PX 57. Once in use, the weight of the closet would be unsustainable. *Id.*

d) The Dexter Property was designed with an overlook from the second floor into the family room on the first floor; the Alpha Column supporting the second floor at this opening was resting only on the subfloor on the first floor, without structural support below it. Tr. 91-93 (Edelson) 8/19/04 p.m.; PX 57. Failure of the subfloor under the Alpha Column would have resulted in its failure, bringing down part of the second floor, and, in fact, the subflooring had already cracked from the weight. Tr. 93-94 (Edelson) 8/19/04 p.m.; PX 57.

e) Two bedrooms that were not on the permit drawings were built over the family room. Tr. 95-96 (Edelson) 8/19/04 p.m.; PX 57. One wall of these bedrooms was a bearing wall for the roof but it was inadequately supported by only the bedroom subflooring without further support below. Tr. 95 (Edelson) 8/19/04 p.m.; PX 57.

f) The wall below the master bedroom, which supported the weight of the bedroom, was placed on the existing subflooring of the first floor without a beam or wall beneath

it to give it structural integrity to the foundation. Tr. 98-99 (Edelson) 8/19/04 p.m.; PX 57. The framing under the first floor would be inadequate to support the first floor, the second floor, and the wall; collapse of the bedroom floor could have occurred under a full load of furniture and people. *Id.*

g) As noted above, the children's bedrooms were above the garage. Mr. Sisson used TJI joists in the ceiling of the garage to support the floor above. Tr. 99-102 (Edelson) 8/19/04 p.m.; PX 57. These kinds of joists were not strong enough for the length of the span and, in fact, already were found to have a one-inch sag, without the additional weight of furniture. *Id.*

h) The wall between the two bedrooms over the garage is a bearing wall that supports the roof but it was inadequately supported by the bedrooms' floor. Tr. 103-05 (Edelson) 8/19/04; PX 57. (The floor of these bedrooms is the ceiling of the garage, which had TJI joists that were beginning to sag. *Id.*) The added roof load increased the load on the floor joists approximately ten times. *Id.* Collapse of the floor would have caused a collapse of the roof. *Id.*

i) A microlam beam supported the west side of the opening over the family room and was, in turn, supported on the exterior wall of the house with no structural column under the beam. Tr. 105-06 (Edelson) 8/19/04 p.m.; PX 57. This beam also carried part of the weight of the second and third floors of the house, resting only on triple wooden studs. *Id.* Failure of the studs could have caused collapse of the floor. *Id.*

j) The entrance foyer of the Dexter Property had a graceful curved stair, at the top of which was a steel column. Tr. 108-110 (Edelson) 8/19/04 p.m.; PX 57. As described by Mr. Edelson, "[a] bracket was cantilevered off the column to support a portion of the roof," but the top of the column had

no support to sustain the weight of the roof, which came down at an angle through the bracket. *Id.* This condition had already resulted in a two-inch (2") lateral deflection of the column under dead load only. *Id.* Mr. Edelson computed the weight of a full roof load and concluded that the deflection would exceed five inches (5") and the column would be overstressed by at least 50%. *Id.* Structural collapse of the roof could have occurred. *Id.*

k) A steel beam was placed under the first floor in the area of the fireplace. Tr. 7 (Edelson) 8/20/04 a.m.; PX 57. A three-inch (3") steel pipe column was supposed to be placed in the basement in line with the fireplace to support this steel beam. *Id.* (This column was shown on the drawings submitted to BID for structural review.). Neither the steel column nor any foundation for a steel pipe column was ever put in place. *Id.* Instead, a single wooden stud was found in its place. *Id.* "A wood stud is structurally inadequate the support the load intended for the 3" pipe column." PX 57 p. 4. The use of wood instead of steel to support the steel beam could have led to collapse of the floor. *Id.*

l) Mr. Sisson added a breakfast room to the Dexter Property, with a steel beam to support the former exterior brick wall of the house. Tr. 10-11 (Edelson) 8/20/04 a.m.; PX . The steel beam was resting on inadequate wood framing around a window or double door. *Id.*; see PX 57 photo C01282-32A. The wooden support on which the steel beam was resting was, in turn, sitting on the subflooring without full support below that. As the wood framing experienced normal drying and shrinking with age, the resulting settlement could have caused cracks in the brick wall. Tr. 10-11 (Edelson) 8/20/04 a.m. The wooden support for the steel beam was already separating from the framing, showing evidence that it was starting to collapse. Tr. 11-12 (Edelson) 8/20/04 a.m.

m) Numerous holes in excess of recommended guidelines were cut in the TJI floor joists under the floors throughout the house. Tr. 14-16 (Edelson) 8/20/04 a.m.; PXs 57, 59. See PX 57 photo CO 1281-21A. The holes were cut to string the electrical wiring through the house but the loss of integrity to the joists could have led to overstressing and individual joist failure. Tr.14-16 (Edelson) 8/20/04 a.m.; PX 57.

n) The Alpha Column first discovered by Mr. Frank to be resting on subflooring without sufficient support was not the last to be identified. Throughout the structure, several columns were found to have inadequate blocking under the columns to sound bearing. Columns were found to be eccentric on their footings and inadequately blocked to some foundations. [See PX 57, photos CO1280-2, 3, 4, 5, 7, 9, 10, 12 37; CO 1282-2A, 4A, 5A & 7A.] . . . . Settlement and cracking could have occurred as a result of the eccentricities or inadequate support.PX 57 p. 4.

o) A masonry pier in the family room was insufficiently grouted solid, leaving voids below the masonry and resulting in inadequate support. Tr. 15-22 (Edelson) 8/20/04 a.m.; PX 57. The pier could have settled and cracked. PX 57.

p) A staircase from the second to the third floor was quite striking in its design: its landing hung out in the air without structural support at the corners away from the wall.

PX 57 photos CO1283-9, CO 1281023A through 30A. While quite attractive, this design was also quite dangerous: the unsupported landing was unstable and the staircase was essentially leaning against the wall. Tr. 23-24 (Edelson) 8/20/04 a.m.; PX 57. The platform at the landing could have collapsed. *Id*. Mr. Frank was concerned about his workers using the staircase even temporarily and immediately shored it up with wooden posts. Tr. 24 (Edelson) 8/20/04 a.m.

q) The house roof over the entry foyer was supported in the northwest corner by a wooden post. Tr. 24-25 (Edelson) 8/20/04 a.m.; PX 57. The post extended down from the third floor, where it ended over a ventilation louver and a door to the basement. *Id.* In essence, the framing around the louver was the ultimate support for that corner of the roof. The post could have punched right through the ventilation opening, leading to structural collapse of the roof. Tr. 25-26 (Edelson) 8/20/04 a.m.; PX 57.

r) Finally, Mr. Edelson identified the rear wall of the garage as an additional structural problem. The back wall of the garage was being used as a retaining wall, despite its brick exterior and wood interior, a combination that could have let moisture penetrate. Tr. 27-30 (Edelson) 8/20/04 a.m.; Tr. 37 (Frank) 8/19/04 a.m.; PX 241 (photos). Moisture could lead to rot and collapse of the wall, Tr. 27-30 (Edelson) 8/20/04 and, in fact, had already entered. *Id.*; PX 241.

4. As noted above, Mr. Sisson's construction expert agreed with Mr. Edelson's testimony and report. Tr. 71-73 (Fernebok) 8/20/04 a.m.; Tr. 45 (Kalreiss) 8/25/04 a.m.

5. The Court finds that the Dexter Property contained numerous severe structural defects, including several that threatened the safety of the occupants.

HVAC System Defects

1. Edward Hite, an HVAC contractor, testified through deposition concerning the HVAC system in the Dexter Property. Tr. 38 8/23/04. The Court also received photographic evidence of those defects. PX 239. Mr. Hite's extremely detailed testimony, accompanied by the photographs, was very persuasive. Mr. Sisson did not provide any countervailing details and offered only argument. The Court credits and accepts Mr. Hite's testimony.

2. An imbalance in the HVAC system and the lack of cooling in some parts of the house were noted by Ms. Wilcox before she moved out in October 2000. Mr. Hite examined the system by removing the HVAC units themselves and running lights through the duct system. Hite Dep. 29-30. He discovered leakage throughout the system, including large holes sucking in dust and insulation from the attic. Hite Dep. 30.

3. As Mr. Hite identified more problems with the HVAC system, he requested that Mr. Frank remove more and more drywall so that the system would be available for inspection. As summarized by Ms. Wilcox's counsel,

> Mr. Hite then discovered that the return air line was sucking fiberglass into the air stream, 8/19/04 a.m. Tr. (Frank) 10, Hite Dep. 120; that the actual units lacked emergency drain pans, Hite Dep. 17; that ducts were not connected properly, 8/19/04 a.m. Tr. (Frank) 45, 47, Hite Dep. 28-29, 38, 41, 58; that there were holes in the supply lines, 8/19/04 a.m. Tr. (Frank) 46; that the lines were not proper[l]y insulated, 8/19/04 Tr. (Frank) 46; that tubes were undersized, Hite Dep. 28, 35, 37; that in places where hard duct lines were required, flex lines were placed instead, 8/19/04 a.m. Tr. (Frank) 48; that there were code violations with the condensate lines, 8/19/04 Tr. (Frank) 9, 48; that in violation of code, some flex ducting was concealed, Hite Dep. 54-56; that a vent flue was improperly glued, Hite Dep. 28; and that the system was improperly drained, Hite Dep. 57-58.
>
> Mr. Hite also found that common industry techniques were not used in installing the original system, Hite Dep. 29, and that it appeared as if the system had not

> been installed by someone competent to do this work. Hite Dep. 120-21.
>
> Under these circumstances, Mr. Frank concluded that, in the face of all of these defects and with a serious question as to the basic competence of Mr. Sisson's HVAC subcontractor, it would not be cost effective to continue searching for further defects and attempting to keep patching problems, and it would not be responsible to leave the existing system in place. 8/19/04 a.m. Tr. (Frank) 66-67.

Plaintiff's Proposed Findings of Fact and Conclusions of Law pp. 34-35 ¶¶ 8,9, 10.

4. The Sisson Defendants argue that the entire system did not need to be replaced and that the third-floor HVAC ducting was not replaced, noting that the third floor is the only floor in the house where Ms. Wilcox did not make upgrades. Tr. 96-97 (Kalreiss) 8/24/04 p.m.; Sisson Defendants' Proposed Findings of Fact and Conclusions of Law at 21 ¶ 58. The Defendants first intimated and then argued outright that Messrs. Frank and Lococo had a financial motivation to manufacture defects and increase their own work on the Dexter Property, while Ms. Wilcox was hoping to build her "dream house" on Mr. Sisson's back. Tr. 35 (McMahon) 8/26/04 a.m.; Sisson Defendants' Proposed Findings of Fact and Conclusions of Law at pp. 45-48 and fn 14. What the Defendants did not do was offer any credible evidence to counter the detailed, explicit, (and photographed) evidence presented by Messrs. Hite and Frank.[13] The Court rejects the

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[13] While the Sisson Defendants argued repeatedly that they were disadvantaged by Ms. Wilcox's failure to give them notice and an opportunity to cure, or an opportunity to view the house before Mr. Frank's investigation and remodeling were completed, the Court notes that they called no HVAC expert to testify from the photographs taken by Mr. Hite and/or Mr. Frank and did not even call the workers who installed

attacks on the characters of Messrs. Frank and Lococo as being counsel's argument unsupported by any facts in the record. The Court accepts and agrees with Ms. Wilcox's statement,

> As defendants' own expert admitted, competent and conscientious subcontractors and contractors tend to work with other competent subcontractors, and the extraordinary number of defects and code violations.built into the very structure of the Dexter Property – and admitted by defendants – called into question the work performed by Mr. Sisson throughout the house. 8/25/04 a.m. (Kalreiss) 33-35.

Plt.'s Proposed Findings at 33 ¶ 2.

5. The Court finds that the HVAC system in the Dexter Property was seriously deficient and potentially dangerous to the residents of the house. The Court further finds that it was reasonable of Messrs. Hite and Frank to recommend that Ms. Wilcox replace the HVAC system and that she was reasonable in accepting their recommendation.

Plumbing System Defects

1.Problems with the plumbing system at the Dexter Property became evident as soon as Ms. Wilcox and her extended family moved into the house and started using the system. Repeated sewage backups that caused overflow to ruin the basement carpeting started immediately. The careless nature of the workmanship on the plumbing system was first revealed when Mr. White, a master plumber, discovered that

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the original HVAC system to counter the photographic evidence and testimony concerning holes, lack of connections between ducting, the use of wrong ducting, and the other flaws in the system.

a ceramic piece from a toilet had been dropped into the pipes and was clogging the pipeline.

1.

2. In addition, Mr. White advised that the 3" soil stack was too small for the number of toilets on the system. Tr. 7 (Frank) 8/19/04 a.m. Mr. Frank discovered leaking pipes and improperly fastened lines. *Id.* at p. 9; Tr. 62-63 (Wilcox) 8/18/04 a.m. The PVC flue piping was not plumbed properly. Tr. 42 (Frank) 8/19/04 a.m.; PX 9.

3. Most critical, perhaps, is that Mr. Sisson's plumber had improperly hand tightened the gas line, which could have allowed natural gas to seep into the basement. Tr. 51 (Frank) 8/19/04 a.m.; PX 9. Mr. Sisson watched the plumber putting in the gas pipe. Tr. 75 (Sisson) 8/24/04 a.m. Specifically, he testified,

> I saw Mr. Hahn putting in the pipe, the gas pipe. And I can assure you that the section that I saw him put in were [sic] not hand tightened, they were, in fact, tighten[ed]. He put on pipe dope, he tightened them up. And, of course, another part of . . . the inspection process, they put those pipes under pressure. They leave them under some kind of pressure overnight.
>
> And if the tube has fallen at all, then of course they don't pass it. . . .
>
> And I must confess, Mr. McMahon, I can't imagine that there were significant problems with the plumbing. I mean, it's just incomprehensible to be frank.

Tr. 75 (Sisson) 8/24/04 a.m. This testimony is curious for what it does not say: it does not affirmatively describe how Mr. Hahn actually tightened the gas pipe but only offers a bare denial that he tightened it by hand. Such a bare denial in

the face of expert testimony to the contrary is not worth much weight. Its weight is undercut by Mr. Sisson's added comment that he still does not"imagine that there were significant problems with the plumbing," despite the detailed report from Mr. White and the testimony of Ms. Wilcox and Mr. Frank to the contrary. One uses a wrench to correct a gas pipe that is hand tightened. Tr. 35 (Lofgren) 8/23/04 p.m. It is not an easy chore, however:

> When plumbing pipes, gas pipes are put together, it's done sequentially. You have to tighten – you have a fitting, you have a pipe. You tighten the pipe. You go to the next piece. You tighten the fitting. Once you've moved on, you can't go back to that piece because to tighten it at one end, means you're loosening it at the other end. So it's not as simple as I made it sound.

Id. See also Tr. 56 (Lofgren) 8/23/04 p.m. ("Q. Now, what is entailed in putting some pipe dope to fix the leaks? A. Disassembling the system. As I've described, these pipes are put together sequentially. One screws into the next. You can't simply take one pipe out and put it back in.").

4. Given the gross inadequacies of the plumbing system – all of which indicated apparent incompetence among those who installed it – and the report from Mr. White, the Court finds that it was reasonable for Ms. Wilcox to accept Mr. Frank's recommendation and to replacethe entire system rather than attempt to investigate further and correct in a piecemeal fashion. The Court finds that it was reasonable not to further trust the work of a plumber who would allow brokenpieces of a toilet to escape into the system, who would leave pipes leaking behind walls, and whowould not take the time to tighten a gas line properly.

Electrical System Defects

1. The electrical system at the Dexter Property contained significant flaws as well, although not on the order of the HVAC or plumbing systems. The dryer was not hooked up to a dedicated circuit, as it should have been. Tr. 8 (Frank) 8/19/04 a.m. This alone suggests that the "electrician" doing the work was incompetent or careless. Line voltage wires for normal household use were strung together with low voltage wires for security, telephone, etc., which can cause static between them. Tr. 34-35 (Frank) 8/19/04 a.m.; PX 236. There were too many plugs on the circuits, leading to circuits tripping. Tr. 51, 88 (Frank) 8/19/04 a.m.; Hite Dep. 88. There were too many holes cut through the joists to let the wires pass through. Tr. 34 (Frank) 8/19/04 a.m.; PX 236.

2. Mr. Lofgren, Ms. Wilcox's expert witness on damages, testified that in "the electrical system[,] certainly[,] there [were] not as many specific defects identified as there were mechanical . . . ." Tr. 50 (Lofgren) 8/23/04 a.m. Nonetheless, he concluded that it was necessary and appropriate to re-wire the house completely:

> Again, these guys don't know what they're doing. . . . [A]ll of those wires need[ed] to get pulled back out in order the effect the repairs in the garage [where there were too many large holes in the joists]. The same is true with many of the structural repairs throughout the house. So now you are pulling these wires back out at this point again the [n]otion that your new subcontractor is going to want to stand behind this, he is going to say replace it all and it's the only way to be sure, short of going through and you know checking everything, every inch of the wires in the house[,] is the only way to be assured that the project is going to be safe and complete and it's cheaper than literally going through the existing [electrical system].

Tr. 51 (Lofgren) 8/23/04 a.m.

3.The house also had to be re-wired because Mr. Lococo's remodeling design required that the electrical junction box be relocated. Tr. 35-37 (Frank) 8/19/04 p.m.

4. The Court concludes that the Dexter Property as built by Mr. Sisson had material defects in the electrical system that needed repair but that the evidence does not support a conclusion that the entire system needed to be replaced, but for the voluntary decision to move the junction box.

Miscellaneous Defects

1.The testimony was uncontradicted that the windows, doors, and skylights all leaked and the security system was not just "roughed in" but defective with cut wires.

1.

2. Based on the uncontradicted testimony of Mr. Frank and the photographs, the Court finds that the fireplace chimneys were installed too close to combustible material, a violation of the building code and a significant fire danger. Tr. 49 (Frank) 8/19/04 a.m.; PX 240.

3. Based on the uncontradicted testimony of Mr. Frank and the photographs, the Court finds that the exterior foundation walls of the house were not parged or coated, improperly exposing them to water damage. Tr. 52-53 (Frank) 8/19/04 a.m.; PX 241. Mold had already started to form on the interior walls as a result. Tr. 53 (Frank) 8/19/04 a.m. The Court further concludes that Mr. Sisson is responsible for repairing this defect even though he did not construct the basement: he knew that the basement had a water and mold problem and intentionally decided to paint and carpet to hide that defect from a buyer rather than address it properly.

G. Mr. Sisson's Credibility

1.Because Mr. Sisson was his own lead witness and is alleged to have defrauded Ms. Wilcox, his credibility as a witness requires specific analysis. As indicated above, the Court concludes that Mr. Sisson was often not a credible witness and he tended to testify as his current interest suggested rather than as the historical facts would otherwise indicate.

2. Mr. Sisson swore that he had no experience as a general contractor before August 2000. Tr. 19 (Sisson) 8/20/04 p.m. In the *Preister* litigation, he admitted under oath that he had served as the general contractor on previous projects before the Dexter Property. Tr. 19-21 (Sisson) 8/20/04 p.m.

3. Mr. Sisson testified that he left the construction details to Mr. Preister. Tr. 58-59 (Sisson) 8/20/04 p.m. Mr. Preister, whom the Court credits, testified that Mr. Sisson served as the general contractor on the Dexter Property and was intimately familiar with its details. Tr. 96-97, 101 (Preister) 8/23/01 p.m.

4. Mr. Sisson asserted that the systems at the Dexter Property functioned well, Tr. 26 (Sisson) 8/23/04 a.m., based in part on the fact that he had lived at the house himself before the sale to Ms. Wilcox. Tr. 5 (Sisson) 8/20/04 p.m. Mr. Preister, whom the Court credits, worked on the property for most of a year on a daily basis and testified that Mr. Sisson did not live at the Dexter Property at the time Mr. Sisson had stated he did. Tr. 107 (Preister) 8/23/04 p.m.

5. Rather than believing the house was well-constructed, Tr. 71, 79-81 (Sisson) 8/20/04 p.m., Mr. Sisson recognized that there was a "major problem" with the "work product" at the Dexter Property, including defects in workmanship and code violations. Tr. 72-75 (Sisson) 8/20/04 p.m.; PX 94; PX 99.

6. Mr. Sisson asserted under oath that his real estate agent told him that he would have the right to cure any defects arising under his warranties. Tr. 5 (Sisson) 8/23/04 a.m. He also testified that Ms. Wilcox also told him that he would have a right to cure. Tr. 5 (Sisson) 8/23/04 a.m. His real estate agent contradicted Mr. Sisson's testimony; not only did she not tell Mr. Sisson that he would have a right to notice and to cure but she recommended warranty insurance, which would not be necessary if he had such rights. Tr. 6 (Cayton) 8/23/04 a.m.; PX 146 (Affidavit of Colleen Cayton) ("[A]t no time did I tell Mr. Sisson or imply to him that prior to his incurring any liability under the warranties in paragraph seven of the contract addendum the buyer would have to notify him of any defects and present [him] with an opportunity to make repairs."). In deposition, Mr. Sisson conceded that Ms. Wilcox never agreed to give him notice and an opportunity to cure under the warranty addendum. Tr. 37 (Sisson) 8/23/04 a.m. (Mr. Sisson's deposition reads: "At settlement I said, you know Mrs. Wilcox you tell me what needs to be fixed and we'll come over and fix it. Question, what did she say? Answer, she didn't respond."). In fact, Mr. Sisson's testimony from his discovery responses, depositions and trial testimony has varied considerably as to the number of conversations he had with Ms. Wilcox and the content of those conversations. Tr. 6 - 12 (Sisson) 8/23/04 a.m.

7. Mr. Sisson's testimony about the financial consequences of his investment in the Dexter Property was similarly variable and untrustworthy. In response to interrogatories, he claimed that he had personally advanced $1,679,000 to the Trust for the Dexter Property, Tr. 137 (Sisson) 8/20/04 p.m.; PX 96, and that the Trust had also borrowed $403,000 from Bank of America by way of a mortgage and $467,226 from Mr. Suren Rajcoomar personally, ending with a loss of $500,000. PX 108; Tr. 101, 137-38 (Sisson) 8/20/04 p.m. Mr.

Sisson testified at trial that he lost money on his Dexter Property investment. Tr. 138-40 (Sisson) 8/20/04 p.m. When it suited him in the *Preister* litigation, however, Mr. Sisson also testified that his costs on the Dexter Property were under $1.2 million, Tr. 91 (Sisson) 8/24/04 a.m.,[14] 14 and that he had made a profit on the Dexter Property. Tr. 3536 (Sisson) 8/23/04 a.m.[15]

8. To explain this varying testimony, Mr. Sisson prepared an exhibit that purported to list all of his and the Trust's costs on the Dexter Property. DX 36. This exhibit was newly-developed during trial and had not previously been disclosed to Ms. Wilcox. Tr. 65 (Sisson) 8/24/04 a.m.; Tr. 57-58, 62-67 (Sisson) 8/24/04 a.m. Mr. Sisson used this exhibit to support testimony that he invested $1,469,538 in the Dexter Property, not including the purchase price of $620,000. Tr. 59 (Sisson) 8/24/04 a.m. With the sale to Ms. Wilcox for $2.050 million, it would appear that Mr. Sisson made no profit, although not to the degree of $500,000 as reported in his interrogatory answer. On the witness stand, however, Mr. Sisson conceded that DX 36 counted the Rajcoomar loan twice. Tr. 133-36 (Sisson) 8/20/04 p.m.; Tr. 68, 86-91 (Sisson) 8/24/04 a.m.; DX 36. The exhibit -- and the testimony based on it -- are wrong. At trial, Mr. Sisson stated that a check to Mr. Rajcoomer, DX 22, Check No. 1132, "was a payment of principal and interest" on the Rajcoomer loan. Tr. 68 (Sisson)

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[14] In *Preister*, Mr. Sisson testified, "'Well, there's different kinds of monies that are spent on renovations. One thing is direct out-of-pocket expenses, another is soft costs, architectural fees, current charges related to interest, et cetera. Everything together between one an[d] 1.2 million.'" Tr. 91 (Sisson) 8/24/04 a.m.

[15] Ms. Wilcox urges the Court to find that Mr. Sisson made at least $773,853 in profit on the Dexter Property. Pltf's. Proposed Findings of Fact p.46 ¶ 4. Mr. Sisson's current position is that he lost money on the investment. The Court need not resolve this dispute, although it does not credit Mr. Sisson's statements, because the profit from the house, if any, is irrelevant to Ms. Wilcox's damages.

8/24/04 a.m. This testimony is not to be believed because Mr. Rajcoomer was repaid from the settlement funds and not with a Trust check. See PX 108 (settlement statement indicating that "reductions in amount due to seller" included the "Payoff of 2nd mtg. loan to SUREN RAJCO" [sic] in the amount of $285,535.00; "PAYOFF Suren Rajcoomar" in the amount of $114,065.33, and "PAYOFF Suren RAJCOOMAR" in the amount of $67,626.00) (emphases in original). The Court concludes that Check No. 1132 on DX 22 was never issued at all and was entered on the check register to create the false appearance of a payment.

9. Mr. Sisson's willingness to enter into evidence defense exhibits 36 (that counted the Rajcoomar loan twice) and 22 (that purported to be a Trust check repaying Mr. Rajcoomer) and to testify in support of these exhibits is extremely troublesome and undercuts his credibility on all critical issues.

10. The record contains other examples of false statements under oath by Mr. Sisson, such as PX 88, an IRS form in which Mr. Sisson stated, under penalty of perjury, that the Dexter Property was his principal residence for at least two of the five years preceding its sale to Ms.Wilcox. That statement was false. Tr. 16 (Sisson) 8/20/04 p.m. Mr. Sisson submitted loan applications to Bank of America attesting that he was purchasing the Dexter Property as a rental property and would rent it for $3,600 per month. PX 139; Tr. 33 (Sisson) 8/20/04 p.m. He admitted, however, that he never intended to rent the Dexter Property and never did so. Tr. 26-29, 47 (Sisson) 8/20/04 p.m. At all relevant times, Mr. Sisson's principal residence has been in Fairfax, Virginia. Tr. 12, 14-16 (Sisson) 8/20/04 p.m. To Bank of America, however, he represented that his home in Fairfax was a rental property from which he received rents of $3,200 per month. PX 139; Tr. 3438 (Sisson) 8/20/04 p.m. This was false. Tr. 38 (Sisson) 8/20/04 p.m. Mr. Sisson even submitted

a false lease agreement, with his signature as lessor, to support the representation that his personal residence was a rental property. Tr. 38-41 (Sisson) 8/20/04.p.m.; PX 136.

11. And, as earlier determined, Mr. Sisson presented Ms. Wilcox with false BID certificates of inspection.

12. From these examples, other instances of untruthful or evasive testimony mentioned earlier in this memorandum opinion, and the entire record, including his demeanor as a witness (demonstrating false affability, answers that wandered into irrelevancies and avoided responding to the question asked, and frequent evasiveness), the Court concludes that Mr. Sisson was not credible or trustworthy.

II. Damages Calculations

1. Michael Lofgren testified as a cost expert for Ms. Wilcox and Ted Kalreiss testified as a cost expert for Mr. Sisson, concerning the estimated cost to remedy the defects at the Dexter Property.

2. Although both cost witnesses have considerable construction expertise, the Court finds that Mr. Lofgren has experience that is more directly relevant. For instance, Mr. Kalreiss works primarily in commercial construction. Tr. 59 (Kalreiss) 8/24/04 p.m. He has rarely, if ever, solicited bids for work on high-end residential renovation of new construction, Tr. 23-26 (Kalreiss) 8/25/04 a.m., and has never served as a contractor on such a project. *Id.* pp. 30-33. In contrast, Mr. Lofgren specializes in high-end residential remodeling and has extensive experience in preparing estimates, soliciting bids, and performing such work in the Washington, D.C. area. Tr. 38-40, 43 (Lofgren) 8/23/04 a.m.; PX 83.

3. Mr. Lofgren's cost estimates were also more reliable because Mr. Kalreiss made certain assumptions or presentation decisions that reduced his costs but failed to account for the actual record facts in the case.

a) The structural defects in the Dexter Property were hidden behind walls and under floors. All the experts agreed that the normal process would be to repair defects as identified, investigate for further evidence of problems, and use elective, sampled demolition and temporary repair until a contractor was satisfied that he had uncovered all defects. Tr. 54-59 (Lofgren) 8/23/04 a.m.; Tr. 31-34 (Edelson, 8/20/04 a.m.; Tr. 38-42, 47-48 (Kalreiss) 8/25/04 a.m. It would have been unreasonable to tear down all the walls upon discovering the first defect. Tr. 55 (Lofgren) 8/23/04 a.m.; Tr. 41-42 (Kalreiss) 8/25/04 a.m.; Tr. 33 (Edelson) 8/20/04. This process of selective investigation would increase labor costs. Tr. 56-59 (Lofgren) 8/23/04 a.m. ("[For] each task there's a certain component [of a set] up stage, being you have to come in, set up. You got to send the guys to the job. They tear this work out. They haul the trash away. They clean up. And then you do that again. These are repeated each time [you discover a new defect].") It also increased materials costs and some work had to be redone, such as ripping up the tile laid in the basement after sewage ruined the carpeting, in order to correct later-discovered structural problems. Tr. 67 (Wilcox) 8/18/04 a.m.

b) Based on the unanimous opinion of all three construction experts and the Court's evaluation of the entire record, the Court finds that it was entirely reasonable for Mr. Frank to proceed with the cautious investigative sampling that he did until most of the first and second floors of the house were revealed, the basement was fully investigated, and the condition of the exterior walls under ground was determined.

c) Mr. Kalreiss prepared three reports. PX 209, PX 210, PX 211. The first and second of these reports suffer from the assumption that Ms. Wilcox intended to remodel and completely "gut" the interior of the Dexter Property; as a result, these two reports estimated only the marginal cost of repair to structural and systemic defects in conjunction with the assumed remodeling.[16] Plaintiff's Exhibit 209, the Kalreiss Report, determined the "reasonable costs of repair for alleged defects" at $225,000. Plaintiff's Exhibit 210, the Kalreiss Rebuttal Report, reduced that estimate to $206,990. The difficulty with these reports and cost estimates is that the premise upon which they are based is without evidentiary support: Ms. Wilcox did not intend to "gut" the house before she started on the odyssey of finding substantial defects in it. The nature of the changes she proposed were, with the exception of the kitchen on the first floor, mainly cosmetic.

d) Plaintiff's Exhibit 211, Mr. Kalreiss's Supplemental Pricing, assumed that all of the defects in the Dexter Property were known on the day that all repair work began. PX 211

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[16] The Kalreiss Report stated that Ms. Wilcox "intended to substantially modify the character of the house; specifically: * Change the windows [sic] * Replace the staircases [sic] * Replace the flooring [sic] * Gut and reconstruct the kitchen * Modify bathrooms [sic] upstairs * Replace all the plumbing fixtures * Replace the doors and hardware in the house." PX 209. Thelisted items inaccurately reflect Ms. Wilcox's intended changes and, in any event, do not support the statement that these changes would "substantially modify the character of the house." Only one staircase was to be moved; only some flooring was to be replaced; and superior windows were to be installed. The only significant item on this list is the removal of the kitchen as built by Mr. Sisson to the basement for Ms. Wilcox's godparents' use and the construction of a new kitchen for Ms. Wilcox. See Tr. 55-58 (Wilcox) 8/18/04 a.m.; PX 7. The effort to magnify the nature of the changes Ms. Wilcox had originally envisioned reduces the value of the Kalreiss Report and the Kalreiss Rebuttal report.

(Kalreiss Supplemental Pricing); Tr. 14-15, 18-19, 35-37 (Kalreiss) 8/25/04 a.m. The Kalreiss Supplemental Pricing report estimated repairs as if no renovations were intended by Ms. Wilcox.The Kalreiss Supplemental Pricing report also assumed that Mr. Kalreiss knew exactly where each defect was located and that every defect could be repaired with very limited work to cut open the precise area of wall or floor to effect the repair. PX 211; Tr. 14-15, 18-19, 35-37 (Kalreiss) 8/25/04 a.m.; Tr. 95-96 (Lofgren) 8/23/04 a.m. None of Mr. Kalreiss's reports contained any costs for investigating and identifying defects. Tr. 14-15, 48 (Kalreiss) 8/25/04. The assumptions in the Kalreiss Supplemental Pricing report are contrary to the evidence in the record and therefore do not support the conclusion that repairs would have cost $347,000. PX 211.

e) In trial testimony, Mr. Kalreiss conceded that his assumptions are contrary to the facts of this case, Tr. 15 (Kalreiss) 8/25/04 a.m., and contrary to his personal experience. Tr. 39 (Kalreiss) 8/25/04. He agreed that any purchaser of the Dexter Property would have had to investigate and selectively demolish to discover the defects in the house. Tr. 38-42, 47-48 (Kalreiss) 8/25/04 a.m. He also agreed that the costs of investigation and discovery of the defects, not included in his reports, would have increased his estimates considerably. Tr. 50-54 (Kalreiss) 8/25/04 a.m. He conceded that the costs of repair would have been between $600,000 and $800,000 if one included the costs of investigation and discovery of the very need to repair. Tr. 54 (Kalreiss) 8/25/04 a.m. He also conceded that some of his costs per hour for subcontractors could not be matched locally. Tr. 23-26 (Kalreiss) 8/25/04 a.m.

f) As a result of these conceded errors behind all three Kalreiss reports, whichare contrary to the facts of the case, the Court cannot credit their results. FED. R. EVID. 702 (expert must apply his "principles and methods reliably to the

facts of the case"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 154 (1999) (excluding expert testimony that is not reasonable in light of the record facts).

4. Mr. Lofgren based his cost estimate on full recognition of the fact that Ms. Wilcox had engaged in selective sampling and demolition during the investigation of defects at the Dexter Property, which significantly increased her costs. Tr. 54-59 (Lofgren) 8/23/04 a.m. Mr. Lofgren's estimate is also strengthened by his careful approach.

a) Mr. Lofgren performed an independent analysis of the defects and what repairs would need to be performed, without reliance on Mr. Frank's activities in that regard. Tr. 44-45, 48-51 (Lofgren) 8/23/04 a.m.; PX 83. He assumed that all original fixtures, appliances, windows, doors, moldings and other finish items would be reused in the reconstruction, regardless of whether they were actually reused. Tr. 59-60 (Lofgren) 8/23/04 a.m.; Tr. 28 (Lofgren) 8/23/04 p.m. He did not include the cost of any upgrades or changes to the house, its systems, or its finishes.Tr. 59 (Lofgren) 8/23/04 a.m.; PX 83.

b) The Sisson Defendants do not seriously take issue with Mr. Lofgren's estimates that it would take thirty-three (33) weeks to complete the entire discovery-of-defects and repair process. Tr. 62 (Lofgren) 8/23/04 a.m.; PX 84. The Court finds Mr. Lofgren's individual estimates entirely reasonable, especially since the actual times spent by Mr. Frank's work crews were greater than Mr. Lofgren's estimates: twelve (12) weeks to discover the defects, in light of the number of defects and the phased investigation, Tr. 62-63 (Lofgren) 8/23/04 a.m.; eight (8) weeks to repair the structure and its defective systems, Tr. 63-64 (Lofgren) 8/23/04 a.m.; and thirteen (13) weeks to perform all the finishing in the house, such as hanging drywall, installing trim, painting, and the like. Tr. 65 (Lofgren) 8/23/04 a.m.

c) Mr. Lofgren testified to specific costs for replacing the HVAC, plumbing,and electrical systems, based on bids received on other jobs from local sub-contractors. Tr. 66-70 (Lofgren) 8/23/04 a.m.; PX 83. The Court finds his methodology to be reasonable and well supported by his experience and testimony. The costs for replacing the HVAC system at $30,000 and the plumbing system, without fixtures, at $40,000, are reasonable.

d) Mr. Lofgren priced replacement of the security system at a minimum of $10,000. Tr. 69 (Lofgren) 8/23/04 a.m. He described the problem of broken wires so that there was no continuity between the wires on each window and a central location, which meant that the wires were broken and not usable. Tr. 68-69 (Lofgren) 8/23/04 a.m. He credibly testified from his experience that "you could get a [security] system in for that [$10,000] but barely" because of the size of the Dexter Property. Tr. 69 (Lofgren) 8/23/04 a.m. Although Mr. Preister testified that the security system he installed cost less than $10,000, Tr. 32-34 (Preister) 8/24/04 a.m., his testimony in this regard is not persuasive because the system he installed was not finished and did not work, and he gave no details as to which areas of the house were actually secured.

e) Mr. Lofgren estimated a cost of $40,000 to replace the entire electrical system at the Dexter Property, Tr. 69 (Lofgren) 8/23/04 a.m., based "on the size of the house." Tr. 69-70 (Lofgren) 8/23/04 a.m. Mr. Lofgren testified that certain errors by Mr. Sisson's electrical subcontractor – "primarily the lack of a dedicated circuit for the dryer [and] . . . arching under the box . . . .", could be repaired without replacement. Tr. 50 (Lofgren) 8/23/04 a.m. Much more serious was the re-wiring required by improper drilling of holes in the TJI joists in the garage and rewiring required by the repairs to the structural defects located throughout the

house. Tr. 50-51 (Lofgren) 8/23/04. Mr. Frank reasonably replaced the entire electrical system because he moved the main junction box, as well as for these reasons established by Mr. Lofgren. Tr. 35-37 (Frank) 8/19/04 p.m. Moving the junction box, however, was not required by any defect. Because Mr. Lofgren did not further specify costs for repair of the electrical system, however, there is an absence of proof that would allow the Court to determine what the costs would be to rewire those parts of the electrical system affected by the structural repairs and attributable to Mr. Sisson, and what costs would be attributable to moving the junction box.

f) Mr. Lofgren offered his expert opinions on what would need to be done to repair the structural defects in the Dexter Property. PX 83. He opined, *inter alia*, that the house required thirteen new footings to support new structural columns and correct the eccentricities of the prior construction. Tr. 84 (Lofgren) 8/23/04 a.m. Mr. Edelson agreed with Mr. Lofgren's approach. Tr. 35 (Edelson) 8/20/04 a.m. Taken all together – the testimony of Messrs. Lofgren and Edelson and the photographs of the original columns off-center on the original footings (PX 57, photos CO1280-2, 3, 4, 5, 7, 9, 10, 12 37; CO 1282-2A, 4A, 5A & 7A) – the Court finds that Mr. Lofgren has amply supported his opinion.

5. Mr. Lofgren's other cost estimates were reasonable for the investigation, demolition, and reconstruction that was necessary at the Dexter Property. Mr. Preister agreed that some of Mr. Lofgren's cost estimates matched the actual costs for the work during the construction of the house. Tr. 28-30 (Preister) 8/24/04 a.m. In addition, Mr. Lofgren's costs were based on having skilled workers to correct the errors made by Mr. Preister's obviously unskilled crew. The

Sisson Defendants did not challenge Mr. Lofgren on cross-examination with respect to his labor or materials estimates and these are accepted without further ado.[17]

a) Mr. Lofgren's estimate that it would require 900 hours of supervision by a working foreman, who would spend a greater proportion of his time supervising than normal (rather than working with his tools) because of the nature of identifying and dealing with latent defects. This explanation was not challenged by the Sisson Defendants and is accepted by the Court as reasonable under the circumstances.[18]

b) The estimate of $1,300 per room for demolition, higher than the $1,000/room normally estimated because of the

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[17] Mr. Sisson's cross examination of Mr. Lofgren attempted to undercut the veracity of Ms. Wilcox's expert witnesses by suggesting that each of them had a commercial interest in exaggerating the flaws at the Dexter Property in order to get the work doing the repairs. Tr. 5-7 (Lofgren) 8/23/04 p.m. See Id. at 7 ("Somebody can come in and look at the work and not necessarily be making a pitch for the work, and give you an unbiased evaluation that this system could be repaired . . . . He or she is not interested in the work, simply giving you a professional number.") He appeared to be outraged at the suggestion that entire systems needed to be replaced. Tr. 10 (Lofgren) 8/23/04 p.m. ("Now, do those deficiencies give you the right to declare that system obsolete or irreparably damage[d]?"). Contrary to this line of questioning, the Court finds that the experts presented by Ms. Wilcox fully detailed the bases for their opinions and were not effectively challenged by Mr. Sisson, who put on no tradesmen other than Mr. Preister, whose lack of construction expertise brought about the problems in the first place.

[18] Mr. Sisson questioned Mr. Lofgren closely on the supervision costs of the project as contained in his estimate, Tr. 30-31 (Lofgren 8/23/04 p.m., but did not present any countervailing evidence that these costs were extraordinary. Mr. Lofgren reasonably explained why the nature of the project would require greater direct supervision than normal.

inefficiencies of first engaging in selective sampling and trying to remove walls, etc., while salvaging as much as possible, is also reasonable and unchallenged by the Defendants. Tr. 77-78 (Lofgren) 8/23/04 a.m.

c) Mr. Lofgren estimated the costs for temporarily shoring up the house at the site of each of the identified structural defects, totaling $9,300. Tr. 80, 88 (Lofgren) 8/23/04 a.m. Mr. Sisson did not challenge this estimate and it is accepted as detailed and reasonable. Similarly, Mr. Lofgren's estimates for correcting the leaking foundation and replacing the defective flat roof were detailed, reasonable, and uncontradicted.

d) Mr.Lofgren estimated that 7,400 drywall sheets would be needed to restore the walls at the Dexter Property, at a cost of $50/sheet. Tr. 92 (Lofgren) 8/23/04 a.m. Mr. Preister testified that the drywall he installed originally cost approximately $18.00 – $20.00/sheet. Tr. 30 (Preister) 8/24/04 a.m. Because Ms. Wilcox's theory of damages is to give her the benefit of her bargain, i.e., a "grand and newly constructed luxury residence," with a "visually awesome interior that combines formality with function, opulence with whimsy, while exhibiting both a genteel and warm presence," PX 2, the Court finds that Mr. Lofgren's supplier would provide the appropriate drywall. In addition, Mr. Preister's cost estimates are inherently unsound: he totally lacked the skills to build a "grand" or "luxury" residence; Mr. Sisson thought he was skimming off the top by charging kickbacks to his suppliers, or using "padded bills," Sisson Dep. 11/27/01, p. 78; and he provided no corroboration to his five-year-old recollection. For the same reasons, the Court credits Mr. Lofgren's estimate that painting the walls of the house would cost at least $70,000, Tr. 93 (Lofgren) 8/23/04 a.m., and not the $27,000 price tag identified by Mr. Preister. See Tr. 28 (Preister) 8/24/04 a.m.

e) Finally, Mr. Lofgren included $15,000 for landscaping in his estimate. Tr. 29 (Lofgren) 8/23/04 p.m.; PX 83. On cross examination, he acknowledged that he did not know what landscaping existed at the time of the sale of the Dexter Property but added, "I would think in a $2-million house, you'd have a shrub or two, but certainly there would be leadwalks, a small patio, ways to get in and out of this house that would subsequently need repair after you've dug the thing up." Tr. 29 (Lofgren) 8/23/04 p.m. Through his questions, Mr. Sisson intimated that "there wasn't a shrub, there wasn't a deciduous caliper tree" at the house. *Id.* A lawyer's questions, of course, are not evidence. And Mr. Lofgren's answer comports with the description of the house from the Southeby advertisement: "Brick terrace off family room and breakfast area;" "Multi-tiered wood deck in backyard;" "Walkout lower level exits to grass patio area." PX 2. These amenities would need repair after work on the house was completed. The Court accepts Mr. Lofgren's estimate as a modest and reasonable one of the cost associated with this replacement.

f) In all, Mr. Lofgren estimated that it would cost at least $806,000 to remedy the defects in the Dexter Property. With the exception of $40,000 for the complete replacement of the electrical system and $1,500 for appliances which were not shown to be defective, the Court finds that this estimate was reasonable, well supported, and conservative under the circumstances.

6. Because of the extent of the work to discover, identify, and repair the defects in the Dexter Property, Ms. Wilcox was forced to move her family out of the house for months. Mr. Lofgren credibly estimated that it would take 33 weeks to restore the house to the condition she was led to believe she had purchased, without regard to the fact that Ms. Wilcox and her family were actually out of the house for a longer period of time because of additional improvements to the

house. Tr. 16-17 (Lofgren) 8/23/04 p.m.; PX 84. The Court received testimony from Corey Burr that the fair rental value for the Dexter Property during this 33-week period was $10,000 per month. Tr. 89 (Burr) 8/23/04 p.m.; PX 75.[19] The Court finds that $82,5000 is reasonable and justified by the record as the fair market rental value for the period that Ms. Wilcox had to vacate the Dexter Property so that its defects could be corrected.

7. As amended, the sales contract on the Dexter Property included a fee-shifting provision in the event of litigation between Mr. Sisson and Ms. Wilcox, whereby the prevailing party is entitled to attorneys' fees. Tr. 91; (Wilcox) 8/18/04 a.m.; PX 3 at ¶ 23; PX 6. Ms. Wilcox seeks recovery of her attorneys' fees and her attorneys have filed such an application. The Court has stayed action on that motion until after resolution of the case on the merits and the Defendants' submission in response.

I.Status of the Trust

1. In the answer to the complaint, Mr. Sisson asserted that the Trust owned the Dexter Property, not he, and that any recovery should be only against the Trust. Answer ¶¶ 10, 40,

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[19] At trial, Mr. Sisson challenged Mr. Burr's expertise, arguing that it was illegal for him to testify to the value of the Dexter Property without first obtaining a license. Tr. 68 - 70, 74 (Burr) 8/23/04 p.m. The argument was first presented in a brief submitted by Mid-County Construction before it reached a settlement with Mr. Sisson and was dismissed. Ms. Wilcox argued that the Sisson Defendants had not filed the relevant brief and had not objected to Mr. Burr's credentials at the pretrial hearing, and so had waived their right to do so. Tr. 68-69 (Burr) 8/23/04 p.m. The matter is not further pursued in Mr. Sisson's post-trial brief or in his proposed findings of fact. The Court finds that Mr. Burr's testimony was entirely credible, that he followed normal and customary industry practice among realtors to value a property for its fair market rental value, and that his testimony was not proffered as, and was not needed to be, a formal appraisal of the Dexter Property. The objection is overruled.

41. This defense was not supported by any evidence introduced by Mr. Sisson at trial and is not argued in his post-trial proposed findings of fact, conclusions of law, or brief. The Court finds that Mr. Sisson has abandoned or waived this defense.

2. In addition, the Court finds that the evidence is clear that the Trust was a sham that never existed in proper legal form and was not maintained as a separate entity from Mr. Sisson personally.

a)The deed to the Dexter Property was in the name of Mr. and Mrs. Sisson and not the Trust, so the Trust never "owned" the house at all. Tr. 49-53 (Sisson) 8/20/04 p.m.; PX 92. Therefore, the Trust basically had no assets.

b) Mr. Sisson was the grantor, primary beneficiary, and sole trustee of the alleged Trust. Tr. 96-98 (Sisson) 8/20/04 p.m.; PX 93. However, according to the Trust instrument, Mr. Sisson's role as beneficiary and sole trustee created a vacancy in the office of trustee. Tr. 96-98 (Sisson) 8/20/04 p.m.; PX 93 at CS 1190. Accordingly, all actions taken by Mr. Sisson under the pretense of being a "trustee" were actually taken by him personally. Tr. 98 (Sisson) 8/20/04 p.m.

c) The Trust was designed only to protect Mr. Sisson's assets from lawsuits. Tr. 4 (Sisson) 8/23/04 a.m. However, Mr. Sisson admitted that he did not treat the Trust as a separate entity; he even argued in the Preister litigation that to treat the Trust rather than him as the true seller of the Dexter Property would elevate "form over substance." Tr. 94-95 (Sisson) 8/20/04; PX 95. Mr. Sisson treated the interest payments on the mortgage, allegedly a Trust debt, as deductions on his personal income taxes. Tr. 88 (Sisson) 8/20/04 p.m. He charged the Trust 16% interest on funds that he allegedly advanced to the Trust from his personal monies,

Tr. 102 (Sisson) 8/20/04 p.m.; PX 96, even though he obtained a commercial loan at that time at 7.5 % interest, Tr. 109 (Sisson) 8/20/04 p.m., and a personal loan from Mr. Rajcoomer at 6% interest. PX 148. Mr. Sisson charged the Trust 16% interest on the first $200,000 he "loaned" to the Trust, starting in November 1998 when he signed a contract to buy the Dexter Property even though he did not actually pay out any money until March 1999 when that sale closed. Tr. 106-08 (Sisson) 8/20/04; PX 92; PX 96. Further, Mr. Sisson used Trust assets for personal items such as newspaper bills, PX 119, credit card bills, PX 115, taxes, PX 113, utility bills, PX 109, and for other real estate and personal investments in the United States and overseas, having nothing to do with the Dexter Property or any alleged asset of the Trust. Tr. 113-114 (Sisson) 8/20/04 p.m.

d) According to his testimony, Mr. Sisson set up a special bank account at Salomon Smith Barney for the proceeds from the June 7, 2001, sale of the Dexter Property because it would earn a higher rate of interest than other accounts. Tr. 145-46 (Sisson) 8/20/04 p.m. But Mr. Sisson moved almost all of the funds out the Trust's account and into his personal account within days of receiving notice of potential claims on June 19, 2001, from Ms. Wilcox's attorney. Tr. 148 (Sisson) 8/20/04 p.m.; PX 10; PX 122. He had no explanation for this action to counter the charge that he was trying to shield "Trust" assets from lawsuits and the Court so finds.

e) This evidence clearly demonstrates that Mr. Sisson and the Charles Sisson Revocable Trust were one and the same.

ANALYSIS

For purposes of analysis, it is critical to appreciate that this is a breach of contract action that also alleges fraud in the inducement. Ms. Wilcox seeks to recover $888, 724.46 to

restore her to the benefit of her bargain: the home as represented to her upon sale -- well-constructed, free of defects and ready for occupancy. She itemizes these damages as $806,224.46 to compensate her for the cost of discovering the defects in the house and restoring the home to the benefit of her bargain, and $82,500 to compensate her for the fair market value of her home during the time she was displaced from it as a result of the home's defective condition.[20] Ms. Wilcox claims that the Sisson Defendants breached their sales contract, breached their warranties, fraudulently induced her into purchasing the Dexter Property, and that they should be estopped from profiting from their breaches.

Mr. Sisson acknowledges that "[i]t is well established that in a suit for breach of contract, a plaintiff is entitled to the benefit of her bargain," Defendants' Memorandum on Recovery of Damages ("Defs.' Damages Mem.") at 12, by placing "an injured party in the same position 'as if there had been no breach.'" *Id.* at 13 (citing *Guthrie v. Greenfield*, 109 A.2d 783, 784 (D.C. 1954) ("[T]he rule of law applicable to such situations is that the injured party should be placed in the same position as if there had been no breach."). Contractual and warrant-based expectation damages return a plaintiff to the "full benefit of its bargain," *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 874 (1986), whereas "tort damages generally compensate the plaintiff for loss." *Id.* at 874 n.9.

Ms. Wilcox's contract-based standard is adopted by the Restatement and D.C. law.See RESTATEMENT (SECOND) OF CONTRACTS § 348 (1981) (in a defective construction

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[20] In addition, Ms. Wilcox asserts the right to the release of $10,000 from the escrow set aside at closing until Mr. Sisson submitted a final approval on the house construction from BID and $7,605 from the escrow fund upon completion of repairs identified in the Itte Report.

case, a plaintiff "may recover damages based on . . . the reasonable cost of completing performance or of remedying the defects."); *Fleming v. Twine*, 58 A.2d 498, 499 (D.C. 1948) (injured party in construction cases entitled to be restored to the benefit of its bargain, including construction costs and value of lost use of property.). Mr. Sisson promised to deliver to Ms. Wilcox, on June 7, 2001, a house free of defect. This is what Ms. Wilcox bargained for and paid over $2 million to obtain. As the preceding findings make clear, this is not what was delivered. The injury -- from not receiving the benefit of her bargain -- accrued on June 7, 2001.

Mr. Sisson would substitute a remedy limited to the "actual economic loss" suffered by Ms. Wilcox. He argues that Ms. Wilcox made extensive changes to the house as part of her remodeling so that some of the defects became irrelevant and should not be charged against him. However, Ms. Wilcox sues for her expectation damages. What she decided to do about the defects once they were all identified is not a component of her recovery. See, e.g., *Clarke v. Cleckley*, 71 A.2d 616, 617 (D.C. 1950); *Information Sys. & Networks Corp. v. Kansas City, Mo.*, 147 F.3d 711, 713 (8th Cir. 1998). "If in the course of making repairs the owner elects to adopt a more expensive design, the recovery should be limited to what would have been the reasonable cost of repair according to the original design." *Temple Beth Sholom & Jewish Ctr., Inc. v. Thyne Constr. Corp.*, 399 So.2d 525, 526 (Fla. Dist. Ct. App. 1981).

The proper approach to calculating damages in the District of Columbia is exemplified by *Rowan Heating-Air Conditioning-Sheet Metal, Inc. v. Williams*, 580 A.2d 583 (D.C. 1990). That case concerned the installation of a defective HVAC system; because "replacement of the entire duct system was necessary in order to ensure that the unit as a whole functioned properly," the plaintiff presented expert

testimony that the cost of replacement would be $10,700, without regard to the cost of repair. *Id.* at 584. The defendant countered that the entire system did not need to be replaced and could be repaired for $500. *Id.* at 585. The trial court, upheld by the Court of Appeals, awarded the plaintiff $10,700 based on the expert testimony without regard to whether the defect had been repaired or what costs had actually been experienced by the plaintiff. Rather, the court stated that "[i]n a breach of contract action, the measure of damages is the amount necessary to place the non-breaching party in the same position he or should would have been in had the contract been performed." *Id.*

Mr. Sisson advances four main arguments in his defense: 1) because Ms. Wilcox breached the warranty by failing to give Mr. Sisson an opportunity to cure the alleged defects, she should not be permitted to recover damages; 2) Ms. Wilcox breached the warranty by failing to keep track of repair expenses as distinct from remodeling expense and should not be permitted to recover damages; 3) the cost model created by Mr. Lofgrean includes numerous items that Ms. Wilcox never proved were defective and were not defective, and also were costed at exaggerated prices while Ms. Wilcox failed to mitigate her damages; and 4) Ms. Wilcox failed to prove that Mr. Sisson deliberately committed a fraud when he sold the house. None of these defenses has merit.

A. Warranty Breach by Failure to Give Notice of Defects

Mr. Sisson argues vociferously that Ms. Wilcox was obligated to give him notice of any defects and an opportunity to cure and that, had she done so, he could have cured the flaws in the Dexter Property at lesser cost with his own workmen, who had given warranties to him. This argument permeates his post-trial brief under every heading. Despite his vigorous argument, this defense has several flaws and is rejected.

First, of course, the Court granted Ms. Wilcox's motion to dismiss Mr. Sisson's counter-claim based on this very theory. Tr. 26, 5/29/03 a.m.; 5/30/03 Memorializing Order. The sales contract and later addendums contained no notice or "cure" provisions obligating Ms. Wilcox to notify Mr. Sisson of any defects in the house. The passage of time has not added any language to those documents.[21]

While Mr. Sisson acknowledges the absence of such written conditions, he asserts that the Court should find that such rights existed either because he and Ms Wilcox exchanged an oral promise or because the documents should be interpreted according to an asserted industry standard, which implies such notice-and-cure rights. In its findings, the Court has already addressed the alleged oral promise given by Ms. Wilcox at the closing on the sale of the Dexter Property. Even if such a conversation occurred, contrary to the evidence summarized above, the casual nature of a "sure" in response to Mr. Sisson's invitation to call him if there were problems at the house would not establish notice and cure rights for the widespread and systemic defects found in the Dexter Property. The Court's conclusion is buttressed by the expert testimony of Mr. Sisson's own witness that the industry standard is to specify notice-and-cure rights if they are intended between a seller and buyer.

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[21] These parties had, in fact, drafted notice and cure provisions applicable to one specific circumstance and could have easily drafted such provisions for broader application if they had so intended. Paragraph 14 of the May 4 contract of sale, entitled "Repairs," contained a requirement that Ms. Wilcox was to notify Mr. Sisson of any repairs to the house required by her lender in order to secure financing, and gave Mr. Sisson the option of making such repairs. See 1st Am. Compl. Ex. 1. Beyond that situation, paragraph 14 expressly stated, "This clause will not release the Seller from any responsibilities . . . set forth in this Contract and any addenda." Id.

Mr. Sisson relies on the provisions of the Uniform Commercial Code, citing *Berman v. Watergate West, Inc.*, 391 A.2d 1351, 1357 (D.C. 1978), to argue that a buyer must notify a seller that the transaction is claimed to involve a breach, and thus open the way for normal settlement through negotiation. *Berman* is inapplicable to the facts here inasmuch as it concerned a "developer of mass-produced housing," i.e., "a mass-produced product which allegedly reached the ultimate consumer in a defective state and caused property damage." *Id.* at 1352. Mr. Sisson relies on Berman for the sentence, "[f]or it is by now widely accepted that the law of products liability applies not only to the sale of goods, but also to the sale of newly constructed homes." *Id.* at 1357. The very next portion of the opinion emphasizes, however, that *Berman's* analysis speaks to mass-produced homes. Immediately after the sentence Mr. Sisson finds so persuasive, the D.C. Court of Appeals continued:

> Thus, in the leading case of *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 90, 207 A.2d 314, 325 (1965), the Supreme Court of New Jersey wrote:
>
> > "We consider that there are no meaningful distinctions between [the] mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles . . .should be carried over into the realty field.

Id. Berman followed other jurisdictions in establishing strict liability or "implied warranties" for the sale of defective mass-produced homes. *Id.* at 1357-59. It further held that any entity which is "an 'integral part of the overall producing and marketing enterprise' that placed the defective product

into the stream of commerce . . . can be held accountable to the ultimate consumer for damage caused by the defective product." *Id.* at 1359 (citation omitted). This analysis is not applicable to this case, which concerns a single house constructed by a single owner.

The crux of Mr. Sisson's argument is best understood in his own words:

> Indeed, "when there are a warranty and a promise to repair, the remedy of first resort is the promise to repair." *New England Power Co. v. Riley Stoker Corp.*, 477 N.E.2d 1054, 1058 (Mass. App. 1985). "If that promise is not fulfilled, then the cause of action is the underlying breach of warranty." *Id.* In the instant matter, there was a promise to repair, implied by industry standards. . . . Ms. Wilcox's remedy was to invoke that promise. She failed to do so, and therefore should be barred from recovering anything under the warranty.

Defendants' Proposed Findings of Fact and Conclusions of Law at 30. By citing cases involving strict liability in the sale of mass-produced homes and referencing an implied promise under the so-called industry standard, Mr. Sisson hopes to escape the clear import of the actual warranties that he extended. The Court has already found that there was no "promise to repair" – clearly evidenced, *inter alia*, by Mr. Sisson's failure to offer any assistance to Ms. Wilcox when she reported her plumbing problems to him one week after closing. There is also no implied industry standard and there is clearly no question of mass-produced houses. This entire argument fails for a complete lack of evidentiary or legal support.

B. Warranty Breach by Failure to Keep Track of Repair Expenses

Mr. Sisson asks the Court to deny any recovery to Ms. Wilcox because she did not distinguish, during renovation and reconstruction of the Dexter Property, which expenses could be attributed to "Sisson Defects" and which expenses were wholly attributable to the remodeling of the house. He argues that the failure to make such distinctions, so that both Ms. Wilcox and Mr. Sisson could track repair expenses on an ongoing basis, was unreasonable and "transforms the warranty from an instrument by which repairs may be fairly effected into a blank check, by which Ms. Wilcox could remodel her house, then charge Mr. Sisson an enormous amount of money." Defendants' Proposed Findings of Fact and Conclusions of Law at 33.

This argument attacks Ms. Wilcox's damages model more than it is based on any express or implied term of the warranties at issue here. Because she remodeled the house, Ms. Wilcox retained Donald Lofgren as a damages expert to calculate the cost of restoring her to the benefit of her bargain – the house as it was advertised and should have been when sold – without regard to her actual expenditures. This is a traditional and legitimate calculation method for breach of contract actions.

The Court has made explicit and detailed findings concerning the validity of Mr. Lofgren's testimony and expert report and rejects Mr. Sisson's defense as unconnected to the record facts and unsupported by the law.

C. Cost Model Included Exaggerated and Unrelated Costs

Mr. Sisson attacks the validity of the cost model developed by Mr. Lofgrenand argues that the Court should rely only on the defects identified by Mr. Chow, on which Mr. Sisson's expert, Mr. Kalreiss, based his cost estimates. For the reasons

stated above, the Court disagrees that the Chow Report or Mr. Kalreiss's cost estimates based on the Chow Report are determinative.

Certain aspects of Mr. Sisson's argument must be addressed separately. He states, "[g]iven the complete 'gut job' on the first and second floors, it is entirely possible that defects were created during the demolition phase of the remodeling." Defendants' Proposed Findings of Fact and Conclusions of Law at 39 n.13. The Court rejects the suggestion that Mr. Frank's work crew, and not Mr. Sisson, is responsible for the defects in the Dexter Property. It is totally lacking in any factual foundation and contrary to all the evidence in the record.

Mr. Sisson attacks Ms. Wilcox's completion of the remodeling of the Dexter Property before filing suit, arguing that "a fact finder may draw an inference adverse to a party who fails to preserve relevant evidence within his exclusive control." *Battocchi v. Washington Hosp. Ctr.*, 581 A.2d 759, 766 (D.C. 1990). "Adverse inferences from the destruction of a document have both an evidentiary and a punitive rationale." *Id.* at 765-66. While Mr. Sisson correctly cites the law, it has no bearing on this case. Mr. Frank carefully preserved the evidence by making an extraordinary photographic record of everything he discovered as he, piece by piece, investigated the construction defects in the Dexter Property. Mr. Sisson made no objection to this evidence, which was verified by Mr. Frank and fully subject to cross examination. With this detailed record, Ms. Wilcox, who had purchased the Dexter Property for a family home, had no obligation to maintain it in its partially stripped-down version for the duration of litigation. [22]

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[22] The Court notes that Mr. Sisson testified that he anticipated a lawsuit as early as November 2001, when he testified in the Preister lawsuit that he was expecting a "$1 million lawsuit" from Ms. Wilcox regarding the

The Court explicitly rejects Mr. Sisson's attack on Ms. Wilcox's good faith. Defendants' Proposed Findings of Fact and Conclusions of Law at 41 ("Ms. Wilcox wants the Court to reward her for destroying evidence by adopting a theoretical model which gives her a huge damage award. This brazen attempt to take advantage of her own bad faith flies in the face of the established law of this jurisdiction and should be rejected."). There is nothing in the record to support the suggestion that Ms. Wilcox has acted in any manner of bad faith. Given its findings about Mr. Sisson's own bad faith, the Court views with incredulity his attempt to make himself a victim.

Mr. Sisson's argument that Ms. Wilcox failed to prove that the HVAC and plumbing systems were defective and needed replacement are also without merit. His suggestion that Mr. Edelson's report is "suspect" because there were no cracks in the walls, Defendants' Proposed Findings of Fact and Conclusions of Law at 44, is laughable. Mr. Sisson's own expert accepted Mr. Edelson's report in whole and Mr. Sisson tried to retain Mr. Edelson himself. Similarly, the Court finds Mr. Sisson's arguments against Mr. Lofgren's report, analysis, and calculations to be wholly without merit. As a witness for Mr. Sisson, Mr. Kalreiss testified to lower damages numbers but did so only by ignoring pertinent facts. When asked to accommodate the record facts in his equation – such as the discovery of the defects over time – Mr. Kalreiss readily came up with a number similar to Mr. Lofgren's. Therefore, with the exception of Mr. Lofgren's costs for replacement of the electrical system, which the

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Dexter Property, "[f]or poor craftsmanship, for defects, again, for general deficiencies in construction," and because "the construction did not meet building regulations and codes." Sisson Dep. 11/27/01 at 92-94, 116. Despite this forecast, Mr. Sisson made no effort to visit or view the Dexter Property until June 2003.

Court found unrecoverable because the evidence did not support the need for an entire new system and no particulars were provided, and of his inclusion of $1,500 for new appliances, which would have been covered by manufacturers' warranties if defective, the calculations by Mr. Lofgren stand unrebutted and fully persuasive.

Finally, Mr. Sisson asserts that Ms. Wilcox failed to mitigate her damages by not allowing Mr. Sisson to address defects in the Dexter Property at lesser cost than Mr. Frank. The Court agrees that "the duty to mitigate damages[] bars recovery for losses suffered by the non-breaching party that could have been avoided by reasonable effort and without risk of substantial loss or injury." *Edward M. Crough, Inc. v. Dep't of Gen. Services of the District of Columbia*, 572 A.2d 457, 466 (D.C. 1990). As with Mr. Sisson's other legal citations, however, this principle of law does not apply to these facts or to the legal theory on which Ms. Wilcox bases her remedy.

The inspection report by Mr. Itte provoked sufficient alarm bells for Ms. Wilcox that she demanded, and received, strong warranties from Mr. Sisson as a predicate to closing on the sale. Immediately upon moving into the house, she experienced raw sewage running over the basement carpeting and complete disinterest from Mr. Sisson when she informed him. Mr. Frank quickly discovered leaking plumbing and inadequate electrical work. When she returned to the house in August 2000, Ms. Wilcox discovered that all of the windows and doors leaked, as well as skylights and roofs. The Court concludes that Ms. Wilcox reasonably concluded, early in her sojourn with the Dexter Property, that the workers who built the house were grossly incompetent. It would have been unreasonable to trust any of them with her home. Ms. Wilcox did not violate a duty to mitigate damages by not entrusting Mr. Sisson with the repairs of the house he had so poorly constructed.

As a matter of law as well, Ms. Wilcox was not required to mitigate her damages by allowing Mr. Sisson to cure the defects in the house. Ms. Wilcox seeks the benefit of her bargain; under this damages rule, a plaintiff need not repair or correct defects in order to recover. See *Rowan*, 580 A.2d at 584; *Guthrie*, 109 A.2d at 784; *Clarke*, 71 A.2d at 617. Obviously, she had no obligation to "mitigate" that which she was not required to do. To be clear, Ms. Wilcox is not seeking recovery for her actual costs of construction but only those damages associated with the time and materials reasonably necessary to return her to the benefit of her bargain.[23]

D. Fraud

Mr. Sisson warranted that the Dexter Property was "free from structural defects," "free from any defect in electrical, plumbing, heating cooling, and ventilating systems," and "free from defects in materials and workmanship." PX 5. As the factual recitation above proves, the Dexter Property, as sold to Ms. Wilcox, was in material breach of these warranties on the date of the sale. It is clear that Mr. Sisson knew that the house was not "free from defects in materials and workmanship" prior to the sale. He only corrected some of the more obvious flaws identified by his realtor and tried to mask others, such as the damp and smell of mold in the basement which he hid by applying new paint and installing new carpet. He defended against Mr. Preister's lawsuit by

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[23] Ms. Wilcox is also entitled to recover the fair market value of the home that she contracted for, for that period of time necessary to restore the house to the contracted-for condition. See *Fleming v. Twine*, 58 A.2d at 499; RESTATEMENT (SECOND) OF CONTRACTS § 348(1) (1981). Although she was actually out of the house for 19 months, she seeks recovery for the 33-week period that was needed to effect repairs to restore her to the benefit of her bargain.

blaming him for construction defects and predicting this litigation.

The Court finds that the Dexter Property was a fraud from the beginning. Mr. Sisson hired Mr. Preister, who had previously done remodeling jobs, to supervise the construction of a 7,000-square-foot, three-story house on top of a 1950's basement. Mr. Preister might have been inexpensive but he was also incapable of the task. Mr. Sisson took a permit to enlarge the existing structure from 1,500 square feet to 3,500 square feet and built a house with 7,000 square feet. He took a permit to add one story and added two. The third story was built without any architectural drawings. There were no timely or competent inspections by BID -- easy to avoid by just not calling the inspectors. Mr. Sisson obtained bank loans through false pretenses. He did minimal cosmetic work to hide the flaws identified by his own realtor. He then told Ms. Wilcox that he had built the house with special care because he had intended to live in it with his own family, although he never had any such intention. These were affirmative acts of intentional fraud to induce the buyer to pay more than the house, as built, was worth.

The Court credits much of Mr. Preister's testimony but does not believe that he did not know enough to realize the need for structural support in at least some of the places identified by Mr. Edelson as lacking proper support. The Alpha Column is a good example of why the Court does not credit Mr. Preister on this part of his testimony. As observed by Mr. Frank and Inspector Shelton and shown in the photographs, PX 57, the Alpha Column on the first floor supported the overlook from the second floor into the family room. It rested on only the subflooring of the first floor, a single layer of plywood which was already beginning to crack. Six inches below the subflooring was a column in the basement which was designed to support the Alpha Column and bring the weight of the second floor down to the foundation. The fact

that a support column in the basement existed but was too short by six inches indicates to the Court that Mr. Preister knew that the Alpha Column needed support but failed to build the structure properly. Other columns had insufficient support of a like nature. (See ¶ F.3.n, *supra*). Similarly, the Court finds that: (1) the use of a wooden stud instead of a steel pipe (called for by the drawings submitted to BID) to support a steel beam under the exterior brick wall of the house (¶ F.3.k., *supra*); (2) the lack of sufficient grout at the base of the masonry column in the family room (¶ F.3.o, *supra*); and (3) the lack of support for the third-floor storage closet, ending on top of a ventilation duct (¶ F.3.c, *supra*), were defects that were just too obvious to be invisible or unknown to a man of the tools.

It may be true that Mr. Sisson did not know that the house was built with all 18 structural defects, some of which could have caused collapse. It is theoretically possible that, despite his experience in remodeling and rebuilding homes and condominiums, he does not understand the basic concepts of structural support. His statements of ignorance ring hollow, however, as did much of his testimony. Mr. Preister testified that Mr. Sisson visited the Dexter Property constantly during its construction and was actively involved in directing the work. The structural defects identified above would have been obvious to anyone with a modicum of construction experience or a logical brain: why would one build a column in the basement that is not tall enough to reach the column directly over it on the first floor? The Court finds that Mr. Sisson knew or should have known of some of the structural defects built into the Dexter Property by Mr. Preister prior to the sale to Ms. Wilcox.

Mr. Sisson's testimony makes clear that he knew that the house also had defects in the electrical, plumbing,

heating/cooling, and ventilating systems prior to the sale.[24] He failed to replace a water heater that was too small for the size of the house. He discovered that there was no ventilation at all to parts of the house and punched holes into the system immediately prior to the sale. He stood and watched the plumber tighten the gas line in the basement which experts for Ms. Sisson credibly testified had been hand tightened improperly.

The Court concludes that Mr. Sisson engaged in a knowing fraud when he sold the Dexter Property to Ms. Wilcox.

E. Escrow Account

The Sisson Defendants counterclaim that Ms. Wilcox breached the escrow agreement concerning the Dexter Property by failing and refusing to return $10,000 to the Trust upon issuance of the final inspection certificate by BID and failing and refusing to return $7,605 upon completion of the repairs identified in the May 7, 2001 home inspector's report (the Itte Report). The Court has found that the final inspection certificate was fraudulent or a forgery. Therefore, the Sisson Defendants failed to fulfill the condition precedent to a release of the $10,000 to the Trust. Those monies ($10,000) will be released to Ms. Wilcox. The parties did not litigate the extent of repairs performed by Mr. Sisson in response to the Itte Report. Failing evidence on the point, the Court will find against Mr. Sisson because, as the counterclaimant, he bore the burden of proof. Those monies ($7,605) will be released to Ms. Wilcox.

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[24] In his pretrial memorandum on damages, Mr. Sisson admitted that he was told by his plumber "before the sale to Plaintiff" of problems with the house's plumbing but that he did not disclose those problems to Ms. Wilcox until "shortly after closing," once her check had cleared. Defs.' Damages Mem. at 21.

DAMAGES

Having found merit to Ms. Wilcox's breach-of-contract claims against Mr. Sisson and having found that Mr. Sisson defrauded Ms. Wilcox, the Court turns to the issue of damages. Ms. Wilcox seeks an award of $888,724.46 plus attorneys' fees. The Court finds that the evidence supports an award of $847,224.46 ($806,224.46 minus $40,000 [replacement of electrical system] and minus $1,500 [new appliances] plus $85,500 [fair market rental value] to restore to Ms. Wilcox the benefit of her bargain.

The sales contract as amended by the parties expressly provided for attorney's fees in favor of the prevailing party if litigation ensued. PX 3 at ¶ 23. Ms. Wilcox is the prevailing party. In addition to her damages award, she is entitled to an award of reasonable attorneys' fees in an amount to be determined.

A separate Order accompanies this Memorandum Opinion.

DATE: February 4, 2005. /s

ROSEMARY M. COLLYER

United States District Judge

APPENDIX L—JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED FEBRUARY 14, 2006

United States Court of Appeals
For the District of Columbia Circuit

No. 05-7038 **September Term 2005**
02cv01455
Filed on: February 14,2006

Cynthia G. Wilcox,
Appellee

v.

Charles Sisson and Charles Sisson Revocable Living Trust,
Appellants

Appeal from the United States District Court
For the District of Columbia
(No. 02cv01455)

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs by the parties and oral arguments of counsel. The court has determined that the issues presented occasion no need for an opinion. See D.C. Cir. R.36(b). It is

Ordered and Adjudged that the District Court's decision is affirmed in part and dismissed in part for lack of

jurisdiction. On all issues except attorney's fees, we affirm the decision below for the reasons offered by the District Court. The court's voluminous findings of fact are not clearly erroneous, and appellant's legal arguments are unavailing.

We have jurisdiction over the District Court's order on the merits even though it has not yet awarded attorney's fees. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1968) ("a decision on the merits is a 'final decision' for purposes of [28 U.S.C.] 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case"); *Carolina Power & Light Co. v. Dynegy Mktg. & Trade*, 415 F.3d 354, 358 (4th Cir. 2005) (an unresolved motion to assess attorneys fees as cost to the prevailing party generally does not prevent a judgment on the merits from being final because it does not call into question a decision on the merits").

In our discretion, however, we decline to exercise pendent jurisdiction over the District Court's decision regarding attorney's fees because that collateral issue has not yet been fully adjudicated. See *Gilda Marx, Inc. v. Wildwood, Inc.*, 85 F.3d 675, 680 (D.C. Cir. 1996) (declining to exercise pendent appellate jurisdiction over ancillary order that granted attorney's fees in an amount to be determined when attorney's fees issue "is not so inextricably intertwined with the judgment on the merits; nor must the former be reviewed in order to review the latter fully"). The appeal as to that issue is therefore dismissed.

Pursuant to Rule 36 of this Court, this dispostion will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. See Fed R.App.P.41(b); D.C.Cir.R.41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

APPENDIX M—UNITED STATES DISTRICT COURT OPINION ON ATTORNEY FEES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA G. WILCOX,

Plaintiff,

v. Civil Action No. 02-1455 (RMC)

CHARLES SISSON, et al.,

Defendants.

MEMORANDUM OPINION ON FEE APPLICATION

The Court previously awarded Cynthia Wilcox $847,224.46 in damages, plus reasonable attorneys' fees in an amount to be determined, to give her the benefit of her bargain for a breach of contract committed by Charles Sisson when he constructed and sold her the residence at 4815 Dexter Street N.W. in Washington, D.C. *Wilcox v. Sisson*, No. 02-1455,

Memorandum Opinion ("Mem. Op.") at 1 (D.D.C. Feb. 4, 2005), *aff'd*, No. 05-7038 (D.C. Cir. Feb. 14, 2006) (unpublished). The frauds that breached the contract of sale are detailed in the Court's previous opinion and need not be repeated here.

Plaintiff now moves, in her Application for Attorneys' Fees and Costs ("Pl.'s App.") [Dkt. #120], and her First and Second Supplements[25] to that application [Dkt. ##126, 163], for anaward of $816,198.93 in attorneys' fees and associated expenses pursuant to an express provision in the Sales Agreement.[26] For the reasons explained below, the Court will grant Ms. Wilcox's fee application in large part, and will award her $775,319.83 in attorneys' fees.

I. FACTUAL BACKGROUND

This matter has been fully contested at every turn by Mr. Sisson. He first avoided service.[27] After years in fractious

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[25] Plaintiff's Third Supplement to her fee application [Dkt. #204] will be addressed in a later decision.

[26] Paragraph 23 of the Sales Agreement specifies:
ATTORNEY'S FEES. In any action or proceeding involving a dispute between the Purchaser and the Seller arising out of this Contract, the prevailing party will be entitled to receive from the other party reasonable attorney's fees to be determined by the court or arbitrator(s). In the event a dispute arises resulting in the Broker being made a party to any litigation or if the Broker is required to bring litigation to collect the Broker's Fee, the Purchaser and Seller agree to indemnify the Broker, the employees, and/or licensees for all attorney fees and costs of litigation, unless the litigation results in a judgment against the Broker, its employees and/or licensees.

[27] See Pl.'s App. Exh. D (reporting that a process server tried for five days to effect service but "Mr. Sisson refused to come to the door" until he waited outside from 3 p.m., when Mr. Sisson did not answer the door, until 5:45 p.m., when Mr. Sisson came out to retrieve his mail and was served).

discovery and trial preparation, the case was tried to the Court between August 18 and August 26, 2004. Both parties have now fully briefed the issues concerning the amount in attorneys' fees and costs that should be awarded. Mr. Sisson argues that Ms. Wilcox's request for $816,198.93 in fees should be reduced by at least $219,628.19 to reflect "the prevailing rate of attorneys' fees in the District of Columbia for similar work," and suggests that it be further reduced because: a smaller, less expensive firm could have been used; counsel made no attempt to control costs; the fee statements are insufficiently specific; and Ms. Wilcox made no effort to settle without resort to litigation. Defendants' Opposition to Plaintiff's Application for Attorneys' Fees and Costs ("Defs.' Opp'n") at 16.

Ms. Wilcox retained Williams and Connolly LLP of Washington, D.C., to represent her in this matter. The partner in charge is Gerson A. Zweifach. Mr. Zweifach graduated from Brown University with an A.B. degree in 1975, *magna cum laude* and Phi Beta Kappa. He graduated from Yale Law School in 1979. After his law school graduation, he clerked for Judge Pierre N. Leval on the District Court for the Southern District of New York and then for Judge David L. Bazelon on the Court of Appeals for the D.C. Circuit. Mr. Zweifach has practiced civil litigation at Williams & Connolly for over 23 years. In 2002, Mr. Zweifach's hourly rate was $475; it increased to $515 in 2003 and to $550 in 2004. A single associate, Manish K. Mital, worked on the case.4 Mr. Mital graduated from the Massachusetts Institute of Technology and Harvard Law School, magna cum laude. He became associated with Williams & Connolly upon his graduation from Harvard Law School in 2000.[28] Mr. Mital's

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[28] A second associate, M.E. Hills, billed a small amount of time to the matter when it was first filed in the Eastern District of Virginia, where

hourly billing rate was $215 in 2002, $255 in 2003, and $295 in 2004. Ms. Wilcox was billed, and paid Williams and Connolly, at these rates. More than 80% of the hours billed to this matter by Williams and Connolly represent hours worked by Mr. Mital rather than Mr. Zweifach. See Pl.'s App. Exh. A (Zweifach Affidavit), Attach. 3 (demonstrating that Mr. Mital billed 1,696 hours and Mr. Zweifach billed 383.25 hours to the case).[29]

II. LEGAL STANDARDS

"The usual method of calculating reasonable attorneys' fees is to multiply the hours reasonably expended in the litigation by a reasonable hourly fee, producing the 'lodestar' amount." *Board of Trustees of the Hotel & Restaurant Employees Local 25 v. JPR Inc.*, 135 F.3d 794, 801 (D.C. Cir. 1998). "This amount may then be adjusted by a multiplier in certain rare and exceptional cases, although there is a strong presumption that the lodestar figure . . . represents a reasonable fee." *Id.* (internal quotation marks omitted). The "lodestar" approach to fee awards was established by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and is the approach followed by the federal courts in most fee award disputes. See *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002) ("Thus, the lodestar method today holds sway in federal-court adjudication of disputes over the amount of fees properly shifted to the loser in the litigation."). Federal courts rely on the lodestar method to calculate fees without regard

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Mr. Sisson resides. However, the case was transferred to this Court over Ms. Wilcox's objections and she is not seeking to recover the fees or costs associated with resisting transfer from Virginia. Pl.'s App. Exh. A ¶ 4.

[29] The first page of the Attachment, which reflects these numbers, is stamped CW03000. Three summer associates who collectively spent 59.50 hours working on the matter were not billed at all. Pl.'s App. Exh. A ¶ 4.

to whether the award would exceed a contingent-fee agreement between client and counsel. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); see *also Venegas v. Mitchell*, 495 U.S. 82 (1990). The fee applicant bears the burden of demonstrating that the claimed rate and number of hours are reasonable. *Blum v. Stentson*, 465 U.S. 886, 897 (1984).

A.Rates

"[T]he burden is on the fee applicant to produce satisfactory evidence — in addition to the attorney's own affidavits — that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stetson,* 465 U.S. 886, 895 n.11 (1984). "A rate determined in this way is normally deemed to be reasonable, and is referred to — for convenience — as the prevailing market rate." *Id.* Given the variation in attorneys' skills and experiences, it is anticipated that the "market rate" for established practitioners will be higher than that for younger lawyers. See *id.* The market generally accepts higher rates from attorneys at firms with more than 100 lawyers than from those at smaller firms — presumably because of their greater resources and investments, such as attorneys, librarians, researchers, support staff, information technology, and litigation services. See Pl.'s App. Exh. C (Helder Associates' 2004 Law Firm Billing Rate Survey).[30] The rates charged by counsel for the winning party are presumptively reasonable if they are the same rates that counsel customarily

[30]These relatively high hourly rates may also be acceptable to the marketplace because such firms more frequently attract superior young lawyers such as Mr. Mital, the associate on this case, who graduated *magna cum laude* from Harvard Law School. See Transcript 8/18/04 a.m. at 43 (counsel for Mr. Sisson commenting to Ms. Wilcox, "your money was well spent").

charge other fee-paying clients for similar work. *Cobell v. Norton*, 231 F. Supp. 2d 295, 302-03 (D.D.C. 2002) ("There is no better indication of what the market will bear than what the lawyer in fact charges for his services and what his clients pay."); see *also Martini v. Fed. Nat'l Mortg. Ass'n*, 977 F. Supp. 482, 485 (D.D.C. 1997).

Reasonable attorneys' fees include charges for legal assistants and law clerks. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) ("Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit."). Various forms of litigation expenses that are not fees for attorneys' time — such as copying charges, court reporter fees, and data research — are also to be included in the award if such expenses are routinely billed by the attorney to his or her client. See *New York v. Microsoft Corp.*, 297 F. Supp. 2d 15, 48 (D.D.C. 2003).

B.Hours

A fee applicant may satisfy its burden of demonstrating that its time was reasonably spent by submitting " 'sufficiently detailed information about the hours logged and the work done' that permits the district court to 'make an independent determination whether or not the hours claimed are justified.' " *Cobell*, 231 F. Supp. 2d at 306 (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982)). The application need not, however, "present the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Id.* "Billable hours in fee applications are susceptible to reduction for failure to allocate tasks efficiently to different attorneys based on experience," for example, where research tasks are performed by relatively

senior attorneys more frequently than seems justifiable, or where some attorneys' efforts seem to have been needlessly duplicated by others. *Id.* at 761. "Hours may also be rejected when work descriptions are so general that a court cannot ascertain the reasonableness of the time claimed." *Id.* at 762. If the Court determines that duplication or waste of effort has occurred, it has the discretion to "simply reduc[e] the proposed 'lodestar' fee by a reasonable amount without performing an item-by-item accounting." *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 908 (D.C. Cir. 1998). The Court may also "in some circumstances consider a fee request, or a particular item within a fee request, so 'outrageously unreasonable' that outright denial of the request or an item within the request would be appropriate." *Id.* Neither party seriously contests any of these legal guideposts.[31]

III. DISCUSSION

Ms. Wilcox prevailed in the underlying litigation and is entitled to an award of attorneys' fees pursuant to the express terms of her contract of sale with Mr. Sisson.

A. Reasonableness of the Rates Charged

The relevant time frame for determining the market rate in Washington, D.C., for trial preparation and trial itself spans the years 2002, 2003, and 2004. For 2003, Ms. Wilcox submits data from the *National Law Journal* that extracts the ranges of partner and associate hourly rates for law firms across the United States as reflected in bankruptcy court filings. For 2004, she submits the national Attorney Billing Rate Survey conducted by Helder Associates. Both data sources allow one to focus on law firms located in the District of Columbia.

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[31] 7 Cf. Part II.C, *infra* at 16.

Mr. Sisson challenges the Williams & Connolly rates on a number of bases. First,he argues that he could "not have anticipated" that Ms. Wilcox would go to "the same law firm that represents General Electric, American Airlines, and 3M to file a lawsuit against him for defects in a private home." Defs.' Opp'n at 1. Further, he "could never have imagined that Ms. Wilcox would spend such a vast sum on attorneys' fees for a case such as this." *Id.* at 1-2. These arguments must fail, as they are irrelevant to the questions whether the hourly rates charged for Messrs. Zweifach and Mital were reasonable and whether the hours expended were reasonable. Having agreed to pay attorneys' fees should he lose any litigation arising from the contract of sale, Mr. Sisson has no basis to challenge Ms. Wilcox's choice of counsel. The time to have limited either party in their choice was at the time of contract formation. Having left the matter open, Mr. Sisson cannot now complain.

Mr. Sisson next argues that the fees charged by Williams & Connolly were much higher than the "rate prevailing in the community for similar work." *Planells v. Howard Univ.*, 34 FEP Cases 66, U.S. Dist. LEXIS 19338, at *6 (D.D.C. 1984) (citing *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980)); see Defs.' Opp'n at 2. Referring to the Helder Associates survey, see Pl.'s App. Exh. C at 72, he argues that in 2004 fewer than 8.6% of partners in law firms with more than 100 attorneys charged at a rate equal to or greater than that of Mr. Zweifach. Mr. Sisson then averages the hourly rates charged by all partners, at law firms of all sizes, who responded to the Helder Associates survey, to contend that the 2004 prevailing hourly rate for partners in D.C. was actually $357.28. He thus submits that Mr. Zweifach's rate should be adjusted accordingly, and his fees reduced by 35%, from $202,815.00 to $131,829.75. Defs.' Opp'n at 4.

Following the same logic, Mr. Sisson also seeks a reduction in fees for the time charged by Mr. Mital. He points out that Mr. Mital's billing rate in 2004 — $295 per hour — was ten dollars higher than the average for associates in his class year working in firms with over 100 attorneys, according to the Helder Associates survey. See Pl.'s App. Exh. C at. 76. Of those associates in large D.C. firms who reported to the survey, nine charged more per hour than Mr. Mital and twenty-six charged less. Defs.' Opp'n at 4. Mr. Sisson notes that the average hourly rate for associates at all reporting law firms in 2004 was $216. *Id.* at 5. Applying this rate to Mr. Mital's time, he seeks a 26% reduction in total charges, from $457,490 to $338,542.60.

Mr. Sisson's approach to calculating the local marketplace for attorney services must be rejected. He would average the hourly rates charged by all partners at all law firms who reported to the 2004 Helder Associates survey and apply the resulting comparison to Williams & Connolly's 2004 rates, and would then use that difference to apply to all years in question. His approach does nothing to identify the appropriate lodestar for use here. The Helder Associates survey reveals clearly that the marketplace tolerates and pays higher hourly rates to lawyers — partners and associates — in large law firms of more than 100 lawyers. Williams & Connolly has more than 200 lawyers. Pl.'s App. Exh. A ¶ 4. It does not practice in the same marketplace as smaller firms that charge less per hour. The comparison Mr. Sisson urges is inapt.[32]

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[32] Mr. Sisson bases his argument in part on the nature of this case. He asserts that this was a straightforward house-defect case and that it did not take sophisticated lawyering (presumably of the kind Williams & Connolly is normally required to apply). Defs.' Opp'n at 1. While this point will be elaborated below, under the reasonableness of the hours expended, the Court will note here that Mr. Sisson's actions — in relation to the construction of the Dexter Property and in conducting this litigation — transformed this case into anything but straightforward

Here, more than 80% of the hours billed reflect work by a junior associate, who billed at significantly lower rates than any partner at many firms. Given its familiarity with the numerous motions, briefs, arguments, discovery disputes, and the bench trial itself, the Court readily finds that Mr. Mital performed in an exemplary manner equal to lawyers many years his senior. Ms. Wilcox's reliance on Mr. Mital was not only efficient, it was effective. Although his rate might have hovered at the high end of the spectrum for associates of his year in the District of Columbia, his value to the case cannot be gainsaid. Through counsel, Mr. Sisson himself admitted to Ms. Wilcox that she had been well represented. Ms. Wilcox obviously agreed, because she has paid the fee statements from Williams & Connolly. The Court concludes that the fees charged for Mr. Mital's work are reasonable for associates of his caliber in the District of Columbia .

The Court likewise finds no reason to question the rates charged by Williams & Connolly for Mr. Zweifach's time on this case. At all times, Mr. Zweifach's hourly rate has been within the range for partners in D.C. law firms of 100 attorneys or more. Moreover, Mr. Zweifach, who is the billing partner on the matter, wrote off $152,765 from the bills actually submitted to Ms. Wilcox.[33] Thus, the effective rates charged to Ms. Wilcox were lower than the stated rates by 22%. Given this exercise in billing judgment, the Court will not further lower Mr. Zweifach's rates and finds that they are reasonable for partners of his experience and skill at firms of greater than 100 lawyers in Washington, D.C.

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[33] See Pl.'s App. Exh. A Attach. 2 at CW 2038, 2044, 2051, 2058, 2065, 2083, 2091, 2100, 2107, 2116, 2136, 2145, 2155, 2164, 2172, 2182, 2191, 2198, 2207, 2214, 2221, 2226, 2245, 2260

B.Reasonableness of the Hours Expended

This lawsuit started with Mr. Sisson evading the process server until service was accomplished in April 2002 only by the process server's remaining in front of Mr. Sisson's residence until he ventured outside. Mr. Sisson next filed a successful motion to transfer venue from the Eastern District of Virginia, where suit was filed, to this Court. He then moved to dismiss the federal case so that it could be consolidated with an action pending in D.C. Superior Court between Mr. Sisson and Dana Preister, the builder of the Dexter Property, although that action had already been tried. See August 16, 2003, Renewed Motion to Dismiss [Dkt. #4]. Mr. Sisson "relied" on the pendency of that motion to justify his refusal to respond to discovery throughout 2002, even after Judge Richard Leon, to whom the case was then assigned, denied his request for a stay in December 2002. The case was transferred to the undersigned in January 2003. At that time, the docket reflected Mr. Sisson's motion to dismiss; Mr. Sisson's motion to strike; Ms. Wilcox's motion to compel discovery and for sanctions; Mr. Sisson's motion for a protective order; and Ms. Wilcox's motion for a status conference, each of which was opposed and fully briefed. By order dated February 27, 2003, the Court denied Mr. Sisson's motions, clarified that he had an obligation to respond immediately to outstanding discovery, and set a March 2003 status conference.

As of that status conference, Mr. Sisson had yet to provide any discovery to Ms. Wilcox. Instead, Mr. Sisson asked that the Court continue to delay entry of a scheduling order to enable him to serve third-party complaints and depose six of his own subcontractors to decide whether to add them to this suit. The Court ordered that all third parties be joined by April 7, 2003, so that a scheduling order could be issued, and the scheduling conference was continued for that purpose. Mr. Sisson then filed but did not serve the third-party

complaints, making the follow-up scheduling conference a useless exercise. He never deposed any subcontractors. He eventually served three third-party defendants but the Court dismissed two of them on summary judgment and dismissed most of the claims against the third. The point of this history lesson is that Mr. Sisson expanded the case without merit, caused significant delay, and added to the expense for Ms. Wilcox.

Mr. Sisson filed three motions to dismiss this lawsuit before he responded to discovery. He first filed a motion to dismiss while the case was still in Virginia. Upon transfer to the District, he filed a renewed motion to dismiss in August 2002. Shortly after this was denied in February 2003, Mr. Sisson filed a third motion to dismiss on April 2, 2003, raising many of the same arguments. None of his motions was found to have merit, but all had to be fully briefed by Ms.Wilcox's counsel and decided by the Court.

The Complaint here was filed on April 23, 2002, against Charles E. Sisson and the Sisson Trust. Mr. Sisson filed his Answer on Mar. 17, 2003. As the record reveals, certain of his asserted defenses had no basis in fact: he denied any personal responsibility for the construction or sale of the residence to Ms. Wilcox and attributed its ownership to the Sisson Trust, *id.* ¶ 10; denied that the Dexter Property had been marketed as "newly constructed," *id.* ¶ 12; denied providing a final inspection approval to Ms. Wilcox, *id.* ¶ 17; denied that the Dexter Property had any defects, *id.* ¶ 23; denied that there were deviations from building permits, *id.* ¶¶ 60-63; and denied the existence of any structural defects, *id.* ¶¶ 42-56. In fact, the Sisson "Trust" was a sham that never counted the Dexter Property among its assets; Mr. Sisson acted as his own general contractor and selected the subcontractors; the marketing brochure proclaimed in writing that the house was newly constructed; Mr. Sisson advanced a counterclaim against Ms. Wilcox in the same document as

his Answer on the premise that she owed him escrow monies because he had provided a final inspection approval; Mr. Sisson had earlier sued Mr. Preister, his contractor, because of defects in the construction; there were no permits of any kind for the third floor added to the house; and there were some 18 crucial structural defects, Mem. Op. at 24-29, some of which were obvious to the naked eye. While a defendant need not confess liability in his answer, the nature of Mr. Sisson's Answer imposed a difficult and time-consuming discovery burden on Ms. Wilcox to demonstrate the truth of certain facts that were not subject to legitimate question.

Mr. Sisson's counterclaims had no merit but required full briefing prior to dismissal. In one, he alleged that Ms. Wilcox was liable to him because she had hired an incompetent home inspector, who might have given Mr. Sisson better warning of defects. *Id.* ¶¶ 33-37. He alleged that Ms. Wilcox had breached the escrow agreement by not releasing funds to him, even though he admitted at trial that he never completed all of the repairs required by the escrow agreement. *Id.* ¶¶ 26-32; Transcript 8/20/04 a.m. at 203-04. With real *chutzpah*, Mr. Sisson alleged that Ms. Wilcox had committed an abuse of process by joining him as a personal defendant when she allegedly knew that there was an "insufficient evidentiary basis" to pierce the veil on the Sisson Trust, which supposedly owned the Dexter Property and sold it to Ms. Wilcox. Answer ¶¶ 38-42; Defs.' Opp'n to Pl.'s Mot. to Dismiss Counterclaims at 11-12 [Dkt. #39]. After extraordinary efforts to extract the documents and information from Mr. Sisson and third parties relating to the Trust, it is now clear that there was never any basis to assert that the Trust existed at all. The Trust never had a Trustee; it never held the Dexter Property; its funds were routinely used by Mr. Sisson for personal purposes; and Mr. Sisson had admitted under oath in his lawsuit against Mr. Preister in Superior Court that Mr.Sisson, not the Trust, sold the Dexter Property to Ms. Wilcox. Proving that the Trust was a sham

took inordinate discovery efforts. Mr. Sisson failed to provide requested documentation and then produced undisclosed checks and other records as he came into his deposition. Williams & Connolly engaged in considerable third-party discovery to learn the truth about the Trust because of Mr. Sisson's failures to respond timely to discovery and respond accurately to questions.

The entire discovery process took more time and more effort than this allegedly straightforward case should have required. The fault for this delay falls squarely on the defendants.

For example:
When Mr. Sisson finally responded to Ms. Wilcox's discovery, he flatly refused to provide any information about the Trust.
When Mr. Sisson finally responded to Ms. Wilcox's discovery, he ignored this Court's order to produce documents immediately and, in fact, produced no documents.
After a telephonic status conference on discovery, and the Court's second order to Mr. Sisson to produce documents (more than a year after the complaint was filed), he produced a handful of documents related to the Trust, with no checks, no bank records, and no list of Trust assets.
At his deposition, Mr. Sisson brought with him a plastic bag full of previously undisclosed checks relating to one of the Trust's accounts and admitted that the Trust had a second, previously unrevealed account for which he brought no records.

Similar conduct permeated discovery in this case. Counsel for Ms. Wilcox repeatedly sent letters to Mr. Sisson demanding responses to her discovery; were forced to take a second day of deposition testimony from him because of belated revelations; and had to engage in expensive third-

party discovery of various financial institutions and individuals to obtain the Trust's financial records. Ultimately, Ms. Wilcox's lawyers spent close to 200 hours researching and briefing Trust-related issues and pursuing and obtaining Trust-related discovery from Mr. Sisson and third parties, not including direct review and analysis for purposes of trial. See Pl.'s App. Exh. A Attach. 3.[34] Because these hours were forced by Mr. Sisson's own conduct, he cannot now complain of the time that this took.

Counsel for Ms. Wilcox also spent hours obtaining and reviewing records and testimony from the litigation between Mr. Sisson and Mr. Preister for purposes of deposing Mr. Preister. This effort proved worthwhile when it revealed that Mr. Sisson had not truthfully testified in this Court about his intentions in buying the Dexter Property, his history of serving as his own general contractor on housing renovation projects, his oversight of the Dexter Property construction, his knowledge of problems with that construction, and the nature of the Trust. See Mem. Op. at 3640 (finding that Mr. Sisson was not a credible witness). The costs of developing this impeachment material should be borne by the party whose misrepresentations made the work necessary.

Mr. Sisson's approach to discovery also increased the charges incurred by Ms. Wilcox for paralegal support. First, his documents were produced in no order whatever and had to be reviewed and organized to be useful. Pl.'s App. Exh. B

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[34] Mr. Sisson complains that the Williams & Connolly fee statements do not clearly delineate the time spent on each task. The Court finds that the fee statements are more than adequate for the purpose. Mr. Zweifach has submitted the firm's invoices to Ms. Wilcox as Attachment 2 to his declaration. See Pl.'s App. Exh. A. The complete time worked by all attorneys and staff persons is reflected in contemporaneously recorded time entries, attached as Attachment 3 to the declaration. A separate breakdown of the time spent byMr. Mital and by Mr. Zweifach is reflected in Attachment 4 to the declaration.

(Mital Decl.) ¶ 5. When he brought hundreds of Trust checks to his deposition, four paralegals spent the morning organizing and copying them so that he might be questioned that afternoon. *Id.* ¶ 4. During expert discovery, Mr. Sisson first failed to produce his expert files and then produced only the originals, forcing Ms. Wilcox to shoulder the charges and the burden of making copies on a rush basis.[35]

Williams & Connolly staffed this case quite leanly and, for much of the pretrial effort, Mr. Zweifach simply guided Mr. Mital's work by way of short meetings between them. Mr. Mital conducted almost all of the factual investigation, developed all expert testimony, attended to all communications with third-party defendants and their counsel, pursued all third-party discovery, handled the pretrial conference on his own, and researched and composed all first drafts of the various pretrial briefs. With this level of attention to conserving resources, and the aggravating factors imposed by Mr. Sisson's dilatory and obstructionist tactics, the Court concludes that the time expended was entirely reasonable and the costs commensurate with necessary preparation.[36]

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[35] One flaw in the paralegal assistance came in checking the final post-trial brief against the trial transcript and exhibits. The cites were almost entirely in error and were of no assistance to the Court, which was required to task its own staff to comb the record to provide accurate citations to testimony and exhibits. The Court will not require Mr. Sisson to pay any of the $5,562.50 in fees charged for cite-checking the brief. Pl.'s App. Exh. A Attach. 2, CW 2267-68, Index ## 2102043, 2106825, 2106772, 2106785, 2108481, 2110235.

[36] For these reasons, Mr. Sisson's argument that Ms. Wilcox made no attempt to control litigation costs is rejected. His argument is really a re-run of his first argument concerning Ms. Wilcox's choice of counsel. See Defs.' Opp'n at 8 ("Plaintiff's choice of law firm clearly indicates a desire to escalate costs. As noted above, Williams & Connolly is a law firm that typically represents large corporations . . . ."). It fares no better the second time around. Mr. Sisson's complaint that both Mr. Zweifach

C.Hail Mary Pass

In what Ms. Wilcox describes as a "Hail Mary" pass, Mr. Sisson last argues that the special warranty he breached was not an amendment to the sales contract and is not subject to the fee-shifting provision of that contract. This argument has no merit. Paragraph 23 of the sales agreement shifted attorneys' fees to the winner in the event of "any action or proceeding" arising thereunder. See *supra* n.1. When her home inspector later identified some problems with the house, Ms. Wilcox sought, and Mr. Sisson provided, a letter containing specific warranties. In a letter dated May 15, 2001, "RE: Contract of Sale May 4, 2001 for 4815 Dexter Street NW, WDC 20007," Mr. Sisson stated, *inter alia*, that

> 7. Seller accepts responsibilities for warranties to the home that will survive settlement as follows:
>
> A. For five years from settlement, that the Residence is free from structural defects.
>
> B. For two years from settlement (but, in the case of appliances, not greater than the scope and length of the manufacturer's warranty) that the Residence is free from any defect in electrical, plumbing, heating, cooling, and entilating systems.

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and Mr. Mital attended the deposition of Richard Frank, Ms. Wilcox's contractor who identified and corrected the flaws in the Dexter Property. falls flat. Mr. Frank was a critical witness, prepared by Mr. Mital for his deposition testimony, but necessary for Mr. Zweifach to observe at deposition and in preparation for putting Mr. Frank on the stand at trial. Given the reliance Mr. Zweifach placed on Mr. Mital to handle the preparation of the case, with its resulting efficiencies (and success), the Court does not fault Williams & Connolly for having both lawyers attend particularly crucial depositions.

> C. For one year from settlement, that the residence is free from any defects in materials and workmanship.

Pl.'s Exh. 6 ("Warranty Letter") ¶ 7. The house failed to measure up to a single one of these warranties. Mem. Op. at 23-29 (structural), 29-32 (heating and cooling), 32-34 (plumbing), and 34 35 (electrical).

Mr. Sisson would now have the Court find that this Warranty Letter was a stand-alone document unconnected to the sales agreement and not governed by fee-shifting provision. This defense has never before been advanced in any pretrial, trial, or post-trial argument or brief. The totality of Mr. Sisson's argument is contained in one short paragraph in his brief:

> The letter containing the warranties that forms a basis for this lawsuit was not part of the Sales Contract. Nowhere in that letter do the parties state that the warranties are incorporated into the Sales Contract. See PX 6. Nor does the letter contain a fee shifting provision. *Id*. Because (1) the letter was not incorporated into the Sales Contract, and (2) the letter does not contain a fee shifting provision, Plaintiff should not be permitted to recover attorneys' fees based on her successful litigation of the warranty claims.

Defs.' Opp'n at 15-16. Since there is no record testimony on this point and Mr. Sisson points to no evidentiary or legal support beyond the documents themselves, the Court interprets his argument to be based on a "plain reading" of the sales contract and Warranty Letter. The Warranty Letter, however, specifically stated that it was regarding ("RE") the Contract of Sale and was written "[p]ursuant to the letter from A. Lee Lundy, Jr. attorney representing purchaser

Cynthia Wilcox." Mr. Lundy's letter, of course, had warned that Ms. Wilcox would not proceed to settlement unless architectural plans, building permits, and manufacturers' literature were provided, certain repairs completed, and certain warranties provided. Thus, by its own terms, the Warranty Letter was tied to the Contract of Sale and its scope is not as "plain" as Mr. Sisson's argument suggests.

Indeed Mr. Sisson's real estate agent, who prepared the Warranty Letter, stated that it was a "contract addendum." Pl.'s Resp. to Defs.' Pretrial Brief Exh. 16 ¶ 2. Mr. Sisson argued in his motion for partial summary judgment on Count II that he disputed whether there was "consideration for the *contractual modification* of additional warranties," Defs.' 12/9/03 Mem. at 2 (emphasis added). And at trial, Mr. Sisson admitted that a breach of any of the warranties would be enforceable in an action in which he would have to "pay reasonable attorney costs for you to pursue the matter if you are disappointed in my work." Transcript 8/25/04 a.m. (Sisson) at 31.

In denying Mr. Sisson's motion for partial summary judgment, the Court adopted this terminology and found that the "contractual modification add[ed] additional warranties to the sales contract." 1/13/04 Mem. Op. at 2. In its post-trial findings of fact, the Court found that, "as amended [by the Warranty Letter], the sales contract on the Dexter Property included a fee-shifting provision." Mem. Op. at 49. For this reason, the Court has already determined that Ms. Wilcox is "entitled to an award of reasonable attorneys' fees in an amount to be determined." *Id.* at 65.

Ms. Wilcox argues that Mr. Sisson's Hail Mary pass is precluded by these prior findings of the Court, and that the status of the Warranty Letter as an addendum to, and part of, the sales agreement is the law of the case. The Court agrees. But whether as a matter of law, fact, or direct concession

from Mr. Sisson, the result is the same: In suing successfully for breach of the warranties, Ms. Wilcox is entitled to the benefit of the fee-shifting provision in the sales contract.

D. Other Litigation Expenses

Williams & Connolly has also charged Ms. Wilcox for various litigation expenses, ranging from administrative charges for photocopies and transcripts to fees paid to experts. While the parties agree that the former are reimbursable as "attorneys' fees" as that phrase is defined in *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989), they disagree over whether expert witness fees are recoverable. District of Columbia law governs the issue. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975) (noting that federal courts sitting in diversity apply state law with respect to attorneys' fees issues*), superseded by statute on other grounds as stated in Moore v. Permanente Med. Group*, 981 F.2d 443, 446 (9th Cir. 1992).

The District follows the "American Rule" on attorneys' fees, by which "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Sundown Inc. v. Canal Square Assocs.*, 390 A.2d 421, 430 (D.C. 1978) (citing *Alyeska Pipeline*, 421 U.S. at 247). "A valid contract provision, however, can authorize an attorneys' fees award." *Id.* at 430. Neither party contests these principles. The narrow question at issue is whether the parties' contract, which explicitly provides for the recovery of attorneys' fees, also allows for recovery of expert expenses billed to the law firm and paid by the firm in the normal course of its epresentation. Finding the issue a debatable one, the Court directed the parties to submit simultaneous supplemental briefs addressing "whether the Sales Agreement, as amended by the Warranty, provides for the recovery of Plaintiff's expert witness fees." The Court is persuaded that it does not.

Where, as here, "a contractual agreement expressly provides for the payment of attorney's fees, the trial court's discretion is limited to ascertaining what amount constitutes a 'reasonable' fee award. Otherwise put, absent public policy considerations or other unusual circumstances, the duty of the trial court is to give meaning to the full agreement of the parties, as interpreted by controlling case law." *Cent. Fid. Bank v. McLellan*, 563 A.2d 358, 360 (D.C. 1989). (citing *Bolgiano & Co. v. Brown*, 333 A.2d 674, 675 (D.C. 1975)). Thus, the Court's role here is fundamentally one of contract interpretation. Paragraph 23 of the Sales Agreement provides:

> **ATTORNEY'S FEES**. In any action or proceeding involving a dispute between the Purchaser and the Seller arising out of this Contract, the prevailing party will be entitled to receive from the other party *reasonable attorney's fees* to be determined by the court or arbitrator(s). In the event a dispute arises resulting in the Broker being made a party to any litigation or if the Broker is required to bring litigation to collect the Broker's Fee, the Purchaser and Seller agree to indemnify the Broker, its employees, and/or licensees for *all attorney['s] fees and costs of litigation*, unless the litigation results in a judgment against the Broker, its employees and/or licensees.

Sales Agt. ¶ 23 (emphasis added) [Dkt. #107, Exh. 17]. Mr. Sisson argues that this provision draws a clear distinction between those fees and costs available in litigation involving the broker versus those available in actions between the buyer and seller alone. Where the broker is not a party to the litigation, as is the case here, the prevailing buyer or seller may collect "reasonable attorney's fees." *Id.* But where the broker is a party, it is entitled to "all attorney['s] fees and

costs of litigation" if it prevails. *Id.* Because there must be some significance to this different language, Mr. Sisson submits, a buyer prevailing in litigation between the buyer and seller alone is not entitled to be reimbursed for "costs of litigation." Mr. Sisson argues that expert witness fees fall under the umbrella of costs, not attorneys' fees, and are therefore not compensable. Ms. Wilcox, on the other hand, argues that expert fees are a quintessential part of attorney's fees, and are thus recoverable — whether or not the broker is involved in the action — when they are "the type[] of expenses typically paid by counsel and then billed to the client." Pl.'s Supp. Mem. at 2. The question, therefore, is this: Did the parties intend that expert fees would be treated as "attorneys' fees" or as "costs of litigation"?

Mr. Sisson finds some support for his position in *West Virginia University Hospitals Inc. v. Casey*, 499 U.S. 83 (1991), *superceded by statute as stated in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994). In *Casey*, the Court considered whether a fee-shifting provision in 42 U.S.C. § 1988 that allows a prevailing party to recover "a reasonable attorney's fee as part of the costs" covered expert fees in excess of those allowed by 28 U.S.C. §§ 1920(3) and 821(b).[37] Recognizing that the limits of §§ 1920(3) and

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[37] As the *Casey* Court explained, 28 U.S.C. § 1920(3) provides in part that "[a] judge or clerk of any court of the United States may tax as costs . . . [f]ees and disbursements for printing and witnesses." *Casey*, 499 U.S. at 86 (quoting 28 U.S.C. § 1920). Title 28 U.S.C. § 1821(b), in turn, "limits the witness fees authorized by § 1920(3) as follows: 'A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance.' " Id. (quoting 28 U.S.C. § 1821). This attendance fee has since been raised to $40 per day. 28 U.S.C. § 1821(b).

1821(b) must hold "absent contract or explicit statutory authority to the contrary," the Court emphasized that it would "not lightly infer that Congress ha[d] repealed §§ 1920(3) and 1821(b) . . . through any . . . provision not referring explicitly to witness fees." *Id.* at 86-87 (citing *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 439, 445 (1987)).

In its search for such "explicit statutory authority," the Court first reviewed a host of fee-shifting statutes, and found that while "some . . . refer only to 'attorney's fees,' many others explicitly shift expert fees as well as attorney's fees." *Id.* at 88 (citations omitted). Convinced by the record of statutory usage that expert fees are "referred to *in addition to* attorney's fees when a shift is intended," *id.* at 90, the Court concluded that "attorney's fees and expert fees are distinct items of expense," *id.* at 92. A contrary reading, it said, would make surplusage out of any references to expert fees in the statutes that explicitly provided for them. See *id.* The Court next looked to judicial usage, finding that the "judicial background against which Congress enacted § 1988 mirrored the statutory background: Expert fees were regarded not as a subset of attorney's fees, but as a distinct category of litigation expense." *Id.* In sum, the *Casey* Court found that the plain language of § 1988, read *in pari materia*, must prevail: "Congress could easily have shifted 'attorney's fees and expert witness fees' or 'reasonable litigation expenses,' as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction." *Id.* at 99.

The D.C. Circuit recently followed *Casey* in *Goldring v. District of Columbia*, 416 F.3d 70 (D.C. Cir. 2005), in which it considered whether the Individuals with Disabilities Education Act's fee-shifting provision, which permits a prevailing parent to recover "reasonable attorneys' fees

as part of the costs," 20 U.S.C. § 1415(i)(3)(B), encompasses expert fees. *Goldring*, 416 F.3d at 7172. The D.C. Circuit held that "because section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift his expert fees, we cannot but conclude that section 1415 does likewise. That is the end of the matter for us." *Id.* at 74. Mr. Sisson argues that *Casey* and *Goldring* should be "the end of the matter" for this Court as well. See Defs.' Supp. Mem. at 3. *Casey* and *Goldring* differ critically from this case, however, in that here the Court is faced with a question of contract interpretation, not statutory interpretation; therefore, the central question is not what Congress intended, but what the parties intended. Although the *Casey* Court undoubtedly found the phrase "attorney's fees" unambiguous, it did so in view of Congress's "record of statutory usage" and the "judicial background against which Congress []acted." *Casey*, 499 U.S. at 88, 92; see *id.* at 98 (considering a statutory phrase "unambiguous" where it "has a clearly accepted meaning in both legislative and judicial practice"); *Goldring*, 416 F.3d at 77 (same). When dealing with a contract rather than a statute, however, Congress's background understanding is only helpful, if at all, to the extent that it illuminates the parties' intent. Moreover, the high bar to finding the implicit repeal of a statute, see Casey, 499 U.S. at 86-87 (citing *Crawford Fitting*, 482 U.S. at 445), is not implicated under these circumstances. Thus, *Casey* and *Goldring* are of little assistance in revealing the parties' intent, and do not necessarily control the outcome here.

Ms. Wilcox, on the other hand, relies principally on two other cases to support her position. She first argues that *Sundown Inc. v. Canal Square Associates*, 390 A.2d 421, 432 (D.C. 1978), "awarded expert fees as part of attorneys' fees in a breach of contract action," Pl.'s Supp. Mem. at 2. Ms. Wilcox misreads *Sundown*. In *Sundown*, the D.C. Court of

Appeals interpreted a lease provision that gave a tenant the right, in the event that its landlord failed to meet its obligations, "to perform the [l]andlord's obligations under the [l]ease and to be reimbursed for its expenses incurred in so doing." *Sundown*, 390 A.2d at 429-30. The lease did not specify what "expenses" were recoverable; the tenant claimed "attorneys' fees, acoustical experts' fees, employees' time, court costs, and miscellaneous expenses." *Id.* at 430. The landlord challenged only the trial court's award of attorneys' fees. *Id.* The D.C. Court of Appeals affirmed the award, viewing the lease as providing for nonrestrictive reimbursement of "all expenses" incurred in performing the landlord's obligations. *Id.* at 431-32. Thus, while *Sundown* holds that "attorneys' fees" may be considered an "expense," and suggests that "expert fees" may likewise be considered an "expense," it assuredly does not say that "expert fees" are properly treated as part of "attorneys' fees."

Ms. Wilcox last relies on *Missouri v. Jenkins*, 491 U.S. 274 (1989), in which the Court, two years before its decision in *Casey*, considered whether the same provision of 42 U.S.C. § 1988 it confronted in *Casey* — "a reasonable attorney's fee as part of the costs" — authorizes compensation for the work of paralegals as well as that of attorneys. *Jenkins*, 491 U.S. at 284-85. In beginning its analysis, the Court stated:

> Clearly, a "reasonable attorney's fee" cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit.

Id. at 285. It then took "as [its] starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys" and moved on to the "more difficult question" of "how the work of paralegals [should] be valuated in calculating" that fee. *Id.* Because a "reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market," it concluded that the "increasingly widespread custom of separate billing for the service of paralegals and law students who serve as clerks must be taken into account." *Id.* at 286. Alone in dissent from this portion of the Court's opinion was Chief Justice Rehnquist, who criticized this logic as paving the way for "prevailing parties [to] recover at market rates for the cost of secretaries, private investigators, and other types of lay personnel who assist the attorney in preparing his case, so long as they could show that the prevailing practice in the local market was to bill separately for these services." *Id.* at 296 (Rehnquist, C.J., dissenting).

Two years later in *Casey*, however, the Court arguably reinterpreted its holding in *Jenkins*, stating that the earlier case "involved a respect in which the term 'attorney's fees' . . . was genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that [paralegal fees] had traditionally been included in attorney's fees and that separate billing should make no difference." *Casey*, 499 U.S. at 100. It continued: "The term's application to expert fees is not ambiguous; and if it were[,] the means of analysis employed in Jenkins would lead to the conclusion that since such fees have not traditionally been included within the attorney's hourly rate they are not attorney's fees." *Id.*

The Court concludes that, under these circumstances, the "full agreement of the parties" to shift reasonable attorneys' fees to the prevailing party does not extend to expert fees.

See *Cent. Fid. Bank*, 563 A.2d at 360 (stating standard). While the phrase "attorneys' fees" arguably admits of some ambiguity in the context of a contract rather than a statute, the plain language of the Sales Agreement alone is insufficient to convince the Court that by saying "attorneys' fees" the parties intended to include "expert fees." Moreover, Plaintiff has failed to establish — as opposed to assert — that pass-through billing of expert fees is now customary. See Pl.'s Supp. Mem. at 1. Specifically, Plaintiff has made no effort to establish that expert fees have "traditionally been included in the attorney's hourly rate," *Casey*, 499 U.S. at 100, or that "the prevailing practice in the local market [is] to bill separately for these services." *Jenkins*, 491 U.S. at 296 (Rehnquist, C.J., dissenting).

It is "the fee applicant [that] bears the burden of establishing entitlement to an award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995). Plaintiff has not met that burden with respect to her expert fees. The Court will therefore not award expert fees for the services of Mr. Edelson ($20,322.30, see Pl.'s Exh. A Attach. 5), Mr. Lofgren ($11,404.30, see Pl.'s Exh. A Attach. 6), and Mr. Burr ($3,750, see Pl.'s Exh. A Attach 7), in the sum of $35,476.60. Recognizing, however, that Mr. Edelson testified at trial on two days (8/19/04 and 8/20/04), and that Messrs. Lofgren and Burr each testified on one day (both on 8/23/04), the Court will award expert witness costs in the amount of $160 as provided by 28 U.S.C. §§ 1920(3) and 1821(b). Thus, it will deduct $35,316.60 from Plaintiff's fee request.

IV. CONCLUSION

Pursuant to the sales agreement, Ms. Wilcox is entitled to an award of reasonable attorneys' fees. The Court finds that the rates and hours charged by Williams & Connolly LLP were

reasonable under these circumstances and enters an award in the amount of $775,319.83, which reflects Ms. Wilcox's request of $816,198.93, less $5,562.50 for certain work by a legal assistant, see *supra* n.11, and less $35,316.60 in expert fees for the services of Messrs. Edelson, Lofgren, and Burr, see *supra* Part III.D. Plaintiff's Third Supplement to her fee application [Dkt. #204] remains outstanding. A memorializing order accompanies this memorandum opinion.

Date: May 25, 2006 /s/

ROSEMARY M. COLLYER

United States District Judge

APPENDIX N—OPINION ON RULE 59(B) MOTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA G. WILCOX,

Plaintiff,

v. Civil Action No. 02-1455 (RMC)

CHARLES SISSON, et al.

Defendants.

ORDER

Pending before the Court is the Defendants' motion pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend the Court's Order dated April 20, 2006. The Rule 59(e) motion has been pending since April 27, 2006, because Defendant Mr. Sisson declared bankruptcy and the automatic stay precluded any action by this Court. Plaintiff was awarded attorneys' fees by this Court and is now a creditor in Mr. Sisson's bankruptcy. Plaintiff reports that Mr. Sisson has argued to the Bankruptcy Court that there is no final judgment from this Court so that the Bankruptcy Court should entertain attacks on the judgment rendered by this Court. Instead, the Bankruptcy Court lifted the automatic stay so that this Court can determine whether Defendants' Rule 59(e) motion has merit. It does not.

This matter was tried to the Court on August 18 through 25, 2004. On February 4, 2005, the Court rendered a decision in favor of Plaintiff. On March 28, 2005, Defendants appealed. The D.C. Circuit affirmed this Court's bench trial decision in favor of Plaintiff. *Wilcox v. Sisson*, No. 05-7038, 2006 WL 593367 (D.C. Cir. Feb. 14, 2006) (affirming district court but declining jurisdiction to review the issue of attorney fees, as that issue was not fully adjudicated).[38]

While Defendants' appeal was pending, on February 10, 2006, Defendants filed a "motion for hearing regarding recently disclosed fraud on the Court." See Dkt. No. 185. The alleged fraud arose from the Plaintiff's purported arrangement with her primary witness to pay for his testimony by giving him 25% of any recovery. The Court deemed Defendants' motion for a hearing to be a Rule 60(b) motion to reconsider its judgment and denied the motion on April 20, 2006. See Dkt. No. 201. On April 27, 2006, Defendants filed a Rule 59(e) motion seeking reconsideration of the Court's April 20, 2006 Order. Defendants' Rule 59(e) motion [Dkt. No. 202] is now before the Court.

"A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Messina v. Krakower*, 439 F.3d 755, 758 (D.C. Cir. 2006). "Fraud on the court" must be established by clear and convincing evidence. *Shephard v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995). The Defendants' memorandum in support of its Rule 59(e) motion is woefully shy of this

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[38] Later, this Court awarded attorneys' fees to the Plaintiff. See Opinion and Order, May 25, 2006. Defendants appealed the decision regarding attorneys' fees on June 23, 2006.

standard. It says, *in toto*: Defendants['] motion for this Court to alter or amend its judgment pursuant to:

1. Fed. R. Civ. P. 59(e).
2. Fed. R. Civ. P. 1.
3..The entire record herein.

See Defs.' Mem. of P. & A., Dkt. No. 202. Now challenged by the lifting of the stay, Defendants posit new evidence through the deposition of Richard Frank, the supposedly-bribed witness, taken in 2007. See Defs.' Reply, Ex. 2 Frank Dep. ("Frank Dep."). Mr. Sisson also presents his own affidavit in support of his request for a hearing. See *id.*, Ex. 3 Sisson Aff.

The Court has reviewed the deposition and finds that while it is "new evidence," it does not support the Defendants' position. The witness denied any agreement to receive 25% of any award to the Plaintiff. Frank Dep. at 24. It appears that the Plaintiff did make such an offer to the witness — prior to the time Plaintiff retained any counsel — and the witness declined. *Id.* When counsel was retained to bring suit, the topic was raised again and counsel said "absolutely not." *Id.* As a result, there was never any such arrangement. The facts that: (i) a lay person made such an offer without the involvement of counsel; (ii) the offer was not accepted then, or at any time, by the witness; and (iii) there never was such an arrangement, do not constitute fraud on the Court.

The Defendants assert that the witness has equivocated and that he has said, privately, that he had a testimony-for-pay agreement with the Plaintiff. Nothing before the Court indicates any equivocation, and the Defendants' assertions to the contrary are not persuasive. The Court already has found truth to be a challenge to Mr. Sisson. See e.g., Mem. Op. dated Feb. 4, 2005, at 14 ("The Court concludes that Mr. Sisson wanted to sell the house 'some way' and

'somehow' without regard to the truthfulness of his statements and assurances to Ms. Wilcox"); *id.* at 40 ("From these examples, other instances of untruthful or evasive testimony mentioned earlier in this memorandum opinion, and the entire record, including his demeanor as a witness (demonstrating false affability, answers that wandered into irrelevancies and avoided responding to the question asked, and frequent evasiveness), the Court concludes that Mr. Sisson was not credible or trustworthy.").

The Court's rationale for denying the Rule 60(b) motion applies to this Rule 59(e) motion as well:

> (1) [T]here is simply **no** competent evidence to demonstrate that the alleged agreement exist[ed], let alone the clear and convincing evidence necessary for Defendants to prevail . . . .
>
> (2) Moreover, it is hardly "new ground," as Defendants assert, that Mr. Frank had a financial incentive to provide testimony favorable to Plaintiff. . . . Because this financial motive was already aired by Defendants, and addressed by the Court, it is difficult to imagine how nondisclosure of the alleged agreement could have "foreclosed full and fair preparation or presentation of [Defendants'] case."
>
> (3) In any event, no deception was achieved. As the Court found, "Mr. Frank carefully preserved the evidence by making an extraordinary photographic record of everything he discovered as he, piece by piece, investigated the construction defects in the Dexter Property." Mem. Op. at 59. Given that Mr. Franks's testimony was painstakingly and independently corroborated, no fraud could have infected the judgment.

Order dated April 20, 2006 [Dkt. No. 201] at 4-5 (case citation omitted).

The Court finds that the "new evidence" presented by Defendants — the deposition of Mr. Frank and the affidavit of Mr. Sisson — is not sufficient to support Defendants' motion for an evidentiary hearing and does not constitute clear and convincing evidence of fraud. Further, Defendants have failed to demonstrate an intervening change of controlling law, the need to correct a clear error, or the need to prevent manifest injustice. Thus, Defendants' Rule 59(e) motion [Dkt. No. 202] is **DENIED**.

SO ORDERED.

DATE: July 19, 2007

/s/

ROSEMARY M. COLLYER
United States District Judge

APPENDIX O—OPINION ON RULE 60(b) MOTION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CYNTHIA G. WILCOX,

Plaintiff,

v. Civil Action No. 02-1455 (RMC)

CHARLES SISSON and

CHARLES SISSON REVOCABLE
LIVING TRUST,

Defendants.

ORDER

Following a seven-day bench trial in August 2004, the Court awarded Plaintiff $847,224.46, plus reasonable attorneys' fees, on her breach of contract and fraud claims. *Wilcox v. Sisson*, No. 02-1455, Mem. Op. at 65 (D.D.C. Feb. 4, 2005). Judgment was entered on February 14, 2005. On November 29, 2005, the Court approved a supersedeas bond posted by Defendants and, pursuant to Federal Rule of Civil Procedure 62(d), stayed execution of judgment pending appeal. The appeal having now been decided, *Wilcox v. Sisson*, No. 05-7038 (D.C. Cir. Feb. 14, 2006) (unpublished), Defendants move, pursuant to Rule 62(b), to stay execution of the supersedeas bond pending a ruling on their separate

motion, under Rule 60(b), to vacate the now-affirmed judgment.[39]

The basis of the latter motion is Defendants' allegation that, in late 2001, Plaintiff offered one of her principal witnesses, Richard Frank, twenty-five percent of any award she might receive in this litigation — an arrangement constituting, in Defendants' view, a purchase of testimony that amounts to a fraud on the Court. For the reasons explained below, the Court will deny Defendants' motion to vacate the judgment, deny as moot Defendants' motion to stay execution of the supersedeas bond, and grant Plaintiff's motion to enforce the supersedeas bond.

A. Defendants' Motion to Vacate the Judgment

Defendants' Rule 60(b) motion explicitly invokes the provisions of subsections 60(b)(3) and 60(b)(6). Defs.' Rule 60(b) Mot. at 1; Defs.' Rule 60(b) Mem. at 1. Rule 60(b)(3) permits the Court, in its discretion, to "relieve a party . . . from a final judgment, order, or proceeding for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3).[40] The D.C. Circuit has recognized

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[39]Defendants' motion specifically asks the Court "to hold an evidentiary hearing to determine the extent and nature" of an alleged fraud on the Court, Defs.' Rule 60(b) Mot. at 1, and Defendants at times insist that they seek only an evidentiary hearing on their allegations of fraud, Defs.' Opp'n to Pl.'s Mot. to Strike at 2. They have also made clear, however, that they "ultimately seek to vacate the judgment docketed herein on February 14, 2005." Defs.' Rule 60(b) Mem. at 1; see also Defs.' Rule 62(b) Mot. at 1. Thus, the Court construes Defendants' Rule 60(b) motion as a motion to vacate the judgment, with a request for a hearing on the issue.

[40] Rule 60(b)(6) permits the same relief "when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)." *Gonzalez v.*

that this subsection provides three distinct grounds for relief: fraud, misrepresentation, or other misconduct. See *Summers v. Howard Univ.*, 374 F.3d 1188, 1192 (D.C. Cir. 2004). The parties' briefs, however, focus singularly on whether the Defendants' allegations amount to a fraud on the Case 1:02-cv-01455-RMC Document 201 Filed 04/20/2006 Page 3 of 6 Court. See, e.g., Defs.' Rule 60(b) Mem. at 5-7. Thus, the Court's focus, like that of the parties, is on the fraud on the court doctrine.[41]

Crosby, 125 S. Ct. 2641, 2645-46 (2005) (quoting Fed. R. Civ. P. 60(b)). Defendants' reliance on this subsection is puzzling, however, in that "courts have universally interpreted 'other' to mean other than the reasons specified in subsections 60(b)(1)–60(b)(5)," *Baltia Air Lines Inc. v. Transaction Mgmt. Inc.*, 98 F.3d 640, 642 (D.C. Cir. 1996), and Defendants offer no "other" reason, besides the alleged fraud, to set aside the verdict. The First Circuit has observed that "[t]he usual reason why litigants urge that their claim is one for 'fraud on the court,' and arises under Rule 60(b)(6), is [to avoid] the one-year limit applicable to ordinary fraud claims under Rule 60(b)(3)." *Roger Edwards LLC v. Fiddes & Son*, 427 F.3d 129, 132 (1st Cir. 2005). Here, however, Defendants filed their Rule 60(b) motion on February 10, 2006, within one year of the challenged judgment, and Plaintiff has not objected on timeliness grounds. See *Mayfair Extension Inc. v. Magee*, 241 F.2d 453, 454 (D.C. Cir. 1957) (per curiam) (stating timeliness standard).

[41] Rule 60(b) provides separately that it "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). The cases demonstrate some ambiguity about whether allegations of fraud on the court should be analyzed under this "savings clause" or under the fraud provisions of subsection 60(b)(3). Compare *Gonzalez v. Crosby*, 125 S. Ct. at 2645 (noting the possibility of "a postjudgment motion . . . alleging fraud on the court under Rule 60(b)(3)") and *Shepherd v. ABC*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (stating standard of review for "a litigant seeking relief from a judgment under [Rule] 60(b)(3) based on allegations of fraud upon the court") with *Baltia Air*, 98 F.3d at 642-43 (analyzing a claim of "fraud on the court" under the savings clause when relief under subsection 0(b)(3) was time-barred) and Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 872 (5th Cir. 1989) (distinguishing claims of "fraud upon the court" from claims of "fraud . . . misrepresentation, or other misconduct"

"Fraud on the court . . . is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Baltia Air*, 98 F.3d at 642 (citation omitted). The doctrine "refers only to very unusual cases involving far more than an injury to a single litigant." *Id.* at 642-43 (citation and internal quotation marks omitted). "Examples include the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony." *Id.* at 643. "It is . . . well-settled that a litigant seeking relief from a judgment under [Rule] 60(b)(3) based on allegations of fraud upon the court must prove the fraud by clear and convincing evidence." *Shepherd v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995).

Fraud alone, however, is not sufficient to justify setting aside a final judgment under Rule 60(b). The Court must also "balance the interest in justice with the interest in protecting the finality of judgments." *Summers*, 374 F.3d at 1193. "That balance is effectuated in part by the requirement that the victim of . . . fraud . . . demonstrate actual prejudice." *Id.* (citing *Anderson v. Cryovac Inc.*, 862 F.2d 910, 924 (1st Cir. 1988)). "This is often worded as a requirement that the movant show that the [fraud] 'foreclosed full and fair preparation or presentation of its case.' " *Id.* (quoting *Anderson*, 862 F.2d at 923).

As an initial matter, there is some question as to whether Defendants' allegations, even if assumed true, rise to the level of a fraud on the Court. See *Baltia Air*, 98 F.3d at 642-43 (noting that the doctrine is limited to "very unusual cases"

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under subsection 60(b)(3), and analyzing the former under the savings clause).

affecting the "judicial machinery"). Defendants' motion fails, however, for a more basic reason: an utter lack of supporting evidence. As the Rule 60(b) movants, Defendants bear the burden of proving their fraud allegations by clear and convincing evidence. *Shepherd*, 62 F.3d at 1477 (D.C. Cir. 1995). They have not even begun to meet this burden. In fact, Defendants' allegations are supported by no evidence whatsoever, save counsel's hearsay assertions. Appended to Defendants' reply brief are declarations from counsel and counsel's assistant, which indicate that they heard Mr. Frank state that he and Plaintiff had entered into the above-described agreement. Mr. Frank, for his part, apparently refused to sign the affidavit that Defendants' counsel drafted for him attesting to the same facts. Thus, there is simply no competent evidence to demonstrate that the alleged agreement exists, let alone the clear and convincing evidence necessary for Defendants to prevail under Rule 60(b).[42]

Moreover, it is hardly "new ground," as Defendants assert, that Mr. Frank had a financial incentive to provide testimony favorable to Plaintiff. As the Court noted in its original opinion, "Defendants first intimated and then argued outright" that, because Mr. Frank was also Plaintiff's contractor, he "had a financial motivation to manufacture defects and increase [his] own work on the Dexter Property." Mem. Op. at 31. The Court, however, "reject[ed] the attacks on [his] character[] . . . as being counsel's argument unsupported by any facts in the record." *Id.* Because this

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[42] The eleventh-hour affidavit of Allison Vann, attached to a Supplemental Memorandum submitted by Defendants without leave of Court, is no better, in that it is based solely on "bits and pieces of conversation that [she] picked up in the office" rather than on personal knowledge. In view of the Court's decision, which takes into account the affidavits' evidentiary value, Plaintiff's Motion to Strike "Reply Affidavits" [Dkt. #188] and Motion to Strike "Supplemental Memorandum" [Dkt. #198] will be denied as moot.

financial motive was already aired by Defendants, and addressed by the Court, it is difficult to imagine how nondisclosure of the alleged agreement could have "foreclosed full and fair preparation or presentation of [Defendants'] case." See Summers, 374 F.3d at 1193. In any event, no deception was achieved. As the Court found, "Mr. Frank carefully preserved the evidence by making an extraordinary photographic record of everything he Discovered as he, piece by piece, investigated the construction defects in the Dexter Property." Mem. Op. at 59. Given that Mr. Franks's testimony was painstakingly and independently corroborated, no fraud could have infected the judgment.

The Court thus finds that Defendants have failed to meet their burden to prove their fraud allegations by clear and convincing evidence, see Shepherd, 62 F.3d at 1477, and will deny Defendants' Rule 60(b) motion. Further, in view of the lack of evidence put forward by Defendants, the Court will deny Defendants' request for a hearing on their Rule 60(b) motion. See *Roger Edwards LLC*, 427 F.3d at 137 ("[T]here is no requirement under Rule 60(b) that contested allegations automatically get an evidentiary hearing regardless of plausibility or import.").

B. Enforcement of the Supersedeas Bond

Defendants also move, under Rule 62(b), to stay enforcement of the supersedeas bond "until th[e] Court has made a decision with respect to [Defendants'] Rule 60(b) motion." Def.'s Rule 62(b) Mem. at 4. In view of the discussion above, this motion will be denied as moot. The Court will grant Plaintiff's motion, pursuant Rule 65.1, to enforce the supersedeas bond.

C. Conclusion

The Court entered judgment for Plaintiff more than one year ago. That judgment has now been affirmed by the Court of Appeals. Defendants' latest effort to delay the day of reckoning, wholly lacking in evidentiary support, must fail. Accordingly, it is hereby

ORDERED that Defendants' Motion for an Evidentiary Hearing Regarding Recently Disclosed Fraud on Court [Dkt. #185], which the Court construes as a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b), with a request for a hearing on the issue, is **DENIED**; and it is

FURTHER ORDERED that Defendants' Motion for a Stay of Execution of the Supersedeas Bond [Dkt. #192] is **DENIED AS MOOT**; and it is

FURTHER ORDERED that Plaintiff's Motion to Enforce Supersedeas Bond [Dkt. #191] is GRANTED up to the penal sum of $847,225.00; and it is

FURTHER ORDERED that Plaintiff's Motion to Strike "Reply Affidavits" [Dkt. #188] and Motion to Strike "Supplemental Memorandum" [Dkt. #198] are **DENIED AS MOOT.**

SO ORDERED.

Date: April 20, 2006 /s/

ROSEMARY M. COLLYER

United States District Judge